DOCKET

No. 83-1097-CFX Title: Margaret M. Heckler, Secretary of Health and Human Services, Petitioner
Status: GRANTED v.
Sandra Turner, et al.

Docketed:
January 4, 1984 Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Klee Jr., John J., Aaronson, Mark A.

Entry	Date	Note	Proceedings and Orders
1	Nov 17 1983		Application for extension of time to file petition and order granting same until January 5, 1984 (Rehnquist, November 18, 1983).
2	Jan 4 1984	G	Petition for writ of certiorari filed.
3	Jan 24 1984		Brief of respondents Dept. of Social Servs., et al. in opposition filed.
4	Feb 4 1984		Brief of respondents AFDC, et al. in opposition filed.
5	Feb 8 1984		DISTRIBUTED. February 24, 1984
6	Feb 27 1984		Petition GRANTED.
8	Apr 10 1984		Order extending time to file brief of petitioner on the merits until May 12, 1984.
9	Apr 16 1984		Brief amicus curiae of Washington filed.
10	May 10 1984		Brief of respondents Dept. of Social Servs., et al. filed.
11	May 11 1984		Joint appendix filed.
12	May 14 1984		Brief of petitioner Heckler, Sec. of HEHS filed.
14	Jun 1 1984		Order extending time to file brief of respondent on the merits until July 16, 1984.
15	Jun 18 1984		Record filed.
16	Jun 27 1984		Record filed.
17	Jun 27 1984		Certified original record, 3 volumes, received.
18	Jul 6 1984		Order further extending time to file brief of respondent on the merits until July 23, 1984.
19	Jul 23 1984		Brief amicus curiae of State of NY filed.
20	Jul 23 1984		Brief of respondents AFDC, et al. filed.
21	Jul 23 1984		Brief amicus curiae of State of NY filed.
22	Jul 30 1984		Application for stay filed with Justice Rehnquist.(A-59)
24	Jul 31 1984		Response requested - due noon, Monday 8/6/84.
25	Aug 8 1984		CIRCULATED.
26	Aug 10 1984		SET FOR ARGUMENT. Tuesday, October 9, 1984. (4th case)
27	Aug 10 1984		Application for stay granted by Justice Rehnquist with memorandum opinion (A-59).
28	Sep 27 1984	X	Reply brief of petitioner Heckler, Sec. of HEHS filed.
29	Sep 28 1984	D	Motion of State respondents for leave to file reply brief in support of petitioner filed.
30	Oct 1 1984		DISTRIBUTED. October 5, 1984. (Above motion)
31	Oct 9 1984		Motion of State respondents for leave to file reply brief in support of petitioner DENIED.
32	Oct 9 1984		ARGUED.

PETITION FOR WRIT OF CERTIORARI

No. 83-1097

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

SANDRA TURNER, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Whether amounts withheld for taxes on earned income received by beneficiaries of the Aid to Families with Dependent Children (AFDC) Program must be deducted or disregarded from "income" in Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(7), in determining eligibility and benefits under AFDC.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Debra Scruggs and Jerrylean Baker were appellees in the court of appeals. Kyle McKinsey, Deputy Director of the California Department of Social Services, and Mary Ann Graves, Director of the California Department of Finance, were appellants in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Statutes and regulations:

Statutes and regulations—Continued: Page

Miscellaneous:

In the Supreme Court of the United States

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Secretary of Health and Human Services, petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-28a) is reported at 707 F.2d 1109. The opinion of the district court (App., *infra*, 29a-56a) is reported at 559 F. Supp. 603.

JURISDICTION

The judgment of the court of appeals (App., *infra*, 57a) was entered on June 10, 1983. A petition for rehearing was denied on September 7, 1983 (App., *infra*, 58a-59a). On November 18, 1983, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and including January 5, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(7), provides in relevant part:

> A State plan for aid and services to needy families with children must * * *
>
> (7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency—
>
> (A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid * * *.

Section 402(a)(8) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(8), provides in relevant part:

> (A) * * *[I]n making the determination under paragraph (7), the State agency—
>
> (i) shall disregard all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or a part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment;
>
> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);
>
> (iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditures for care in

> such month for a dependent child, or an incapacitated individual living in the same home as the dependent child, receiving aid to families with dependent children and requiring such care for such month, to the extent that such amount (for each such dependent child or incapacitated individual) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month); and
>
> (iv) shall disregard from the earned income of any child or relative receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, an amount equal to the first $30 of the total of such earned income not already disregarded under the preceding provisions of this paragraph plus one-third of the remainder thereof * * *; and
>
> (B) provide that (with respect to any month) the State agency—
>
> (ii) (I) * * *
>
> (II) in the case of the earned income of a person with respect to whom subparagraph (A)(iv) has been applied for four consecutive months, shall not apply the provisions of subparagraph (A)(iv) for so long as he continues to receive aid under the plan and shall not apply such provisions to any month thereafter until the expiration of an additional period of twelve consecutive months during which he is not a recipient of such aid.

45 C.F.R. 233.20(a)(6)(iv) provides:

> With reference to commissions, wages, or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

45 C.F.R. 233.20(a)(3)(ii)(D) provides in relevant part:

> [I]n determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources * * * have been uniformly applied:
>
> * * * * *
>
> (D) Net income, * * * and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

STATEMENT

This case involves the proper computation of benefits payable under Subchapter IV, Part A, of the Social Security Act, Aid to Families with Dependent Children (AFDC), 42 U.S.C. (& Supp. V) 601 *et seq.* In particular, the case presents the question whether net income (after mandatory deductions for Social Security, local, state and federal income taxes) or gross income is to be utilized by the states in calculating AFDC benefits under Section 402(a)(7) of the Act, 42 U.S.C. (Supp. V) 602(a)(7).

1. The AFDC program, created in 1935 (49 Stat. 620), is a joint federal/state public assistance program. The federal government reimburses the states for a percentage of the funds they expend aiding families with needy children. 42 U.S.C. (& Supp V) 603. In return, the states administer their assistance programs pursuant to a "state plan." 42 U.S.C. (& Supp. V) 602. State plans establish the level of benefits that will be paid to eligible families by setting a "standard of need," which is "the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level." *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974). *See* 45 C.F.R. 233.20; *Rosado* v. *Wyman*, 397 U.S. 397, 409 (1970); *King* v. *Smith*, 392 U.S. 309, 318-319 (1968). The amount of the AFDC grant is determined by comparing a family's income, as computed according to Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(7), with the state standard of need. If a family's income under Section 402(a)(7) "is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference." *Shea*, 416 U.S. at 254.

In its earliest formulation, Section 402(a)(7) required state agencies to "take into consideration any * * * income and resources of any child claiming aid to dependent children." Social Security Act Amendments of 1939, ch. 666, § 401(b), 53 Stat. 1379-1380 (1939). In 1962 this directive was amended so that, in addition to "income and resources," all "expenses reasonably attributable to the earning of any such income" were taken into account in determining need. Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 109(b), 76 Stat. 188 (1962). This amendment "made *mandatory* the widespread but then optional practice of deducting employment expenses from total income in determining eligibility for assistance." *Shea*, 416 U.S. at 260. As of 1962, therefore, AFDC benefits were calculated by comparing the total income and resources of a family, as reduced by the expenses reasonably related to the earning of that income, with a state's standard of need. No other steps were involved.

In 1968, numerous important changes were made in the AFDC statute. Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 881. Although Section 402(a)(7)'s directive regarding expenses reasonably related to the earning of income was not altered, Congress made that directive subject to the provisions of a new section, Section 402(a)(8), 42 U.S.C. (Supp. V) 602(a)(8). Section 402(a)(8), as originally enacted, created several new deductions (or "disregards") from "earned income" that were intended to encourage AFDC grant recipients to seek employment. One such "work incentive" required state agencies to disregard, with respect to any month, the first $30 of "earned income" plus one-third of the remainder (81 Stat. 881); another required the states to disregard the "earned income" of full-time students (*ibid.*); a third

permitted income to be set aside for the future needs of a dependent child (*ibid.*).

That same year, pursuant to 42 U.S.C. (Supp. V) 1302, the Secretary of Health, Education, and Welfare (the predecessor agency of the Department of Health and Human Services) issued a regulation defining the term "earned income" in Section 402(a)(8). That regulation, which has remained essentially unchanged since 1969, provides that "earned income" is "the total amount [of income], irrespective of personal expenses, such as income tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers." 45 C.F.R. 233.20(a)(6)(iv).

2. From 1968 to 1981 the AFDC statutory scheme did not change in any respect relevant to this case. In calculating AFDC benefits a state considered total income and resources, then deducted from "earned income" the various disregards of Section 402(a)(8), and finally deducted the expenses reasonably related to the earning of income under Section 402(a)(7). During this period, state, federal and Social Security taxes were regarded by the Secretary and by most states as expenses related to the earning of income within the meaning of Section 402(a)(7). See *Shea*, 416 U.S. at 254-255; *Bell* v. *Hettleman*, 558 F. Supp. 386, 392 n.8 (D. Md. 1983).

In 1981, the Omnibus Budget Reconciliation Act (OBRA), Pub. L. No. 97-35, 95 Stat. 357, radically changed the AFDC program. While keeping intact the language in Section 402(a)(7) that instructs states to take into account a family's income and resources, Congress eliminated the requirement that states also consider the expenses reasonably related to the earning of income. 42 U.S.C. (Supp. V) 602(a)(7). At the same time, Congress amended Section 402(a)(8) to create a $75 work expense disregard, to be taken from an individual's "earned income." 42 U.S.C. (Supp. V) 602(a)(8)(A)(ii). Congress also established an additional disregard for child care expenses (42 U.S.C. (Supp. V) 602(a)(8)(A)(iii)) and limited to four consecutive months the previously open-ended monthly disregard of the

first $30 of earned income plus one-third of the remainder (42 U.S.C. (Supp. V) 602(a)(8)(A)(iv) and (B)(ii)).

In light of the above statutory changes, the Secretary advised state agencies that mandatory payroll deductions were to be considered as work expenses subject to the newly created $75 work expense disregard of Section 402(a)(8). Similarly, because of Congress's deletion of the deduction for expenses related to the earning of income, the term "income" in Section 402(a)(7) was to be construed as gross income. California published regulations implementing these instructions. EAS § 44-113.21, 44-113.212 to 44-113.213.[1] It is not disputed that, under the new formula, the average AFDC grant to the approximately 45,000 AFDC families within the State of California will be reduced.

3. Respondents, a class of all past, present and future AFDC recipients in California, brought this suit in the United States District Court for the Northern District of California to challenge the California regulations implementing the Secretary's instructions.[2] Respondents asserted that, despite the changes wrought by OBRA, Con-

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[1] The California regulations provide in relevant part:

§ 44-113.21—Computation of Net Nonexempt Earned Income for Aid to Families with Dependent Children

.211 Determine the total amount of commissions, wages or salary earned as an employee during or applicable to the month (i.e., total income irrespective of expenses, voluntary or involuntary deductions).

• • • • •

.212 Determine the total profit from self-employment by a recipient whose earnings are not exempted under Section 44-111.22 by offsetting the business expenses against the gross income from self-employment.

a. Personal expenses such as income tax payments, lunches, entertainment and transportation to and from work are not classified as business expenses and shall not be deducted from gross income in determining total profit earned from self-employment.

• • • • •

.213 For each recipient, combine any total earnings determined in .211 above with any total profit determined in .212.

[2] The Secretary was brought into the action by the State of California as a third-party defendant.

gress intended that net income rather than gross income be considered by the states in calculating the needs of AFDC grant recipients, and that mandatory payroll withholding therefore should be subtracted from gross pay before the $75 work disregard of Section 402(a)(8) is applied.

The district court agreed with respondents, holding that Congress did not intend the term "income" in Section 402(a)(7) to include mandatory payroll deductions. Accordingly, the court granted respondents' motion for summary judgment and enjoined the State of California from implementing its new regulations (App., *infra*, 48a). The court also enjoined the Secretary from terminating the provision of federal matching funds to the State (*ibid.*).

4. The court of appeals affirmed. The court recognized that no provision of the Social Security Act of 1935, or of the amending Acts of 1939, 1962, 1968, or 1981 defined the word "income" in Section 402(a)(7) (App., *infra*, 9a). The court also concluded that the literal language of Section 402(a)(7) was of little aid in resolving the question of congressional intent (App., *infra*, 9a). The court, therefore, examined at some length the legislative history of Title IV of the Social Security Act. Its inquiry, however, focused almost entirely on the intentions of pre-OBRA Congresses (*id.* at 9a-22a).

The court of appeals noted that the legislative history of Title IV evidenced a strong congressional desire to promote employment as an alternative to the AFDC program (App., *infra*, 14a-19a). The court then reasoned that the Secretary's construction of Section 402(a)(7) would discourage employment, because under that approach some AFDC recipients could increase their disposable income by refusing employment in order to receive full AFDC grants (App., *infra*, 24a-26a). The court also stated that the Secretary's construction of Section 402(a)(7) was inconsistent with an agency regulation (45 C.F.R. 233.20(a)(3)(ii)(D)) which provides that "net income" shall be utilized in determining need (App., *infra*, 19a). Relying primarily on its perception of the intent of pre-OBRA Congresses to avoid financial disincentives to employment, the court concluded that mandatory payroll deductions "are not income for purposes of AFDC calculations performed pursuant to 42 U.S.C. §§ 602(a)(7) and 602(a)(8)" (App., *infra*, 26a).

REASONS FOR GRANTING THE PETITION

1. The decision below conflicts with the decision of the Third Circuit in *James* v. *O'Bannon*, 715 F.2d 794 (1983), and the decision of the Fourth Circuit in *Bell* v. *Massinga*, No. 83-1227 (Nov. 14, 1983). The Third Circuit in *James* specifically disapproved of the Ninth Circuit's rationale in this case and held that the Secretary was correct in instructing the states to construe the term "income" in Section 402(a)(7) as gross income. The Third Circuit found that Congress had clearly provided for such a result by eliminating the deduction in Section 402(a)(7) for expenses reasonably related to the earning of income and substituting, instead, the $75 work expenses disregard of Section 402(a)(8). 715 F.2d at 801-802. The Fourth Circuit in *Massinga* agreed with the Third Circuit, observing that "[w]e can add nothing new to the discussion. Nor can we resolve the conflict between the two circuits." Slip op. 6.

This sharp conflict in the circuits, as well as in the district courts,[9] has produced a significant disparity in the treatment of AFDC beneficiaries, depending solely upon whether the AFDC grant recipient resides in one jurisdiction rather than another. Because the question presented by this case affects the amount of benefits many AFDC recipients are entitled to receive, and in some cases determines entitlement itself, it is of crucial importance to the millions of Americans who are currently receiving, or believe themselves eligible to receive, AFDC benefits. The decision below, moreover, increases significantly the cost of

[9] See, *e.g.*, *RAM by Benjamin* v. *Blum*, 564 F. Supp. 634 (S.D.N.Y. 1983); *Dickerson* v. *Petit*, 569 F. Supp. 636 (D. Me. 1983), appeal pending, No. 83-1676 (1st Cir.); *Williamson* v. *Gibbs*, 562 F. Supp. 687 (W.D. Wash. 1983), appeal pending, No. 83-3725 (9th Cir.); *Nishimoto* v. *Sono*, 561 F. Supp. 692 (D. Hawaii 1983), appeal pending, No 83-2214 (9th Cir.).

the AFDC program.[6] This Court should resolve the disagreement over the interpretation of an important federal statute.

2. Review also is required because the decision of the court of appeals is incorrect. Section 402(a)(7) requires that "any * * * income and resources" of an AFDC beneficiary be considered in determining need, "except as * * * otherwise provided in [Section 402(a)(8)]" (42 U.S.C. (Supp. V) 602(a)(7)). Section 402(a)(8), by its express terms, applies to "earned income" (42 U.S.C. (Supp. V.) 602(a)(8)), which is an obvious subset of the more inclusive term "income" utilized by Congress in Section 402(a)(7). "Earned income," moreover, has been consistently construed by the Secretary as "the total amount [of wages or salary], irrespective of personal expenses, such as income-tax deductions" (45 C.F.R. 233.20(a)(6)(iv)).

Thus, in calculating the amount of an AFDC grant, the Social Security Act plainly requires the states to consider, first, the gross wages or "earned income" of an AFDC beneficiary, as well as any other income available to the applicant. The states are then required to consider the various "disregards" authorized by Congress in Section 402(a)(8). As modified by OBRA in 1981, that Section permits the states to disregard up to $160 in child care expenses as well as a flat $75 deduction "in lieu of itemized work expenses" (S. Rep. 97-139, 97th Cong., 1st Sess. 435 (1981)). 42 U.S.C. (Supp. V) 602(a)(8)(A)(i) and (ii). Prior to OBRA, the Secretary and the states generally treated mandatory payroll deductions for income and Social Security taxes as itemized work expenses. See *Shea*, 416 U.S. at 254-255; *Bell* v. *Hettleman*, 558 F. Supp. at 392 n.8.

In light of the above statutory scheme, the proper outcome of this litigation is apparent. The AFDC benefit calculation begins with gross—not net—income, and the payroll deductions disputed by respondents are subsumed within the Section 402(a)(8) "work expenses" disregard. The lower

[6] HHS has estimated that the lower court's construction of Section 402(a)(7), if applied on a nationwide basis, would increase federal AFDC expenditures by $37 million annually.

courts reached the contrary result by ignoring the plain legislative intent behind OBRA, by contorting Congress's and the Secretary's past construction of the term "income" in Section 402(a)(7), and by failing to give Section 402(a)(8) its proper scope.

a. The decision below fails to give effect to the significant changes in the AFDC program enacted by Congress in 1981. The OBRA amendments preserved the requirement that the states take into account the "income and resources" of a family in determining need, but removed from Section 402(a)(7) any requirement that they account for "expenses reasonably attributable to the earning of any such income" in making that determination. Instead, Congress created the $75 work expense disregard of Section 402(a)(8), which is to be deducted from "earned income" each month. 42 U.S.C. (Supp. V) 602(a)(8)(A)(ii). This disregard was designed to apply "in lieu of itemized work expenses" (S. Rep. 97-139, *supra*, at 435), and hence was clearly intended to supplant all previous deductions for expenses related to the earning of income—including income taxes.

The court of appeals failed to acknowledge that the OBRA amendments worked this significant change in the manner in which AFDC benefits are to be calculated. Instead, the court focused on the policy objectives of past Congresses and construed Section 402(a)(7) so as to avoid penalizing employed AFDC recipients. The legislative history of OBRA indicates, however, that the 97th Congress was well aware that it was substantially modifying prior financial incentives to employment.

In discussing the budgetary impact of the 1981 amendments, the Senate Report states (S. Rep. 97-139, *supra*, at 552 (IV Budgetary Impact of Finance Committee Amendments)):

> These proposals (standardized work expense disregard, 4 month limit to $30 plus one-third, and others) would, however, increase the work disincentives found in the current AFDC program. Currently, AFDC families, on the average, are able to retain about 50 percent of their earned income. Under the proposed changes, AFDC families would be able to retain only about 20 percent of their earned income.

There was also ample testimony before Congress emphasizing the view that substitution of the flat $75 disregard in Section 402(a)(8) for the open-end deduction in Section 402(a)(7) was unreasonable. See, *e.g.*, *Spending Reduction Proposals: Hearings Before the Senate Comm. on Finance*, 97th Cong., 1st Sess. Pt. 1, at 227 (1981) (statement of Marian Wright Edelman); *Administration's Proposed Savings in Unemployment Compensation, Public Assistance, and Social Services Programs: Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 88-89 (1981) (statement of Christine Pratt-Marston). Therefore, in amending Title IV of the Social Security Act in 1981, Congress clearly recognized that it was creating the financial "disincentives" found unacceptable by the court of appeals. It nevertheless enacted OBRA.

The significance of the above legislative history apparently escaped the court below, but not the Third Circuit. That court observed that, while "Congress continues to embrace the fundamental goal of encouraging self-sufficiency of AFDC recipients, it has largely abandoned the financial incentives approach which the 87th Congress had embraced." *James*, 715 F.2d at 809.[5] Although the Ninth Circuit noted that there are "two Congresses and two sets of intentions at issue here" (App., *infra*, 23a), it failed to give any effect to the most recent—and controlling—expression of the legislative will.

b. The court of appeals also erred by holding that Congress and the Secretary have always construed the term "income" in Section 402(a)(7) to mean net rather than gross income. At least since the 1968 amendments to the Social Security Act, the term "income" in Section 402(a)(7) has meant gross income—the amount, in other words, from which all deductions provided by Congress are to be made. Indeed, this Court, in construing the previous Section 402(a)(7) adjustment for expenses reasonably related to the

[5] The Third Circuit noted in *James* that Congress enacted various work programs as part of OBRA to encourage acquisition and retention of employment. 715 F.2d at 809, citing S. Rep. 97-139, *supra*, at 502-503.

earning of income, recognized that the term "income" in that section means gross income. As the Court noted in *Shea*, 416 U.S. at 254: "[A]ny expenses reasonably attributable to the earning of income are deducted from gross income."[6]

c. In any event, as the Third Circuit held in *James*, 715 F.2d at 805-808, the pivotal provision here is not Section 402(a)(7) and its language concerning "income" and "resources," but Section 402(a)(8). Section 402(a)(7) is applicable "except as may be otherwise provided in [Section 402(a)(8)]." 42 U.S.C. (Supp. V) 602(a)(7). Section 402(a)(8) deals with "earned income" and contains a flat $75 work expense disregard from such income. 42 U.S.C. (Supp. V) 602(a)(8). And, since 1969, when the "earned income" language first appeared in the statute, the Secretary has defined this term as "the total amount, irrespective of personal expenses such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers." 45 C.F.R. 233.20(a)(6)(iv).

Thus, when Sections 402(a)(7) and 402(a)(8) are read together, the proper construction of the term "income" in Section 402(a)(7) is plain. Because Section 402(a)(7) is subject to the provisions of Section 402(a)(8), and because that latter section relies upon gross income, the AFDC benefit calculation begins with gross, not net, income. Moreover, contrary to the court of appeals' conclusion, the income tax deduction sought by respondents is subsumed within the flat "work expense" disregard provided by Congress in Section 402(a)(8). As the Third Circuit succinctly stated in

[6] For a court to rule—as did the court below—that the term "income" in Section 402(a)(7) has always meant net income, it would have to demonstrate that the deductions considered in *Shea* never encompassed mandatory payroll deductions. Yet, it is plain that mandatory payroll deductions were traditionally regarded by the Secretary and the states as falling within the definition of expenses attributable to the earning of income. See, *e.g.*, *Shea*, 416 U.S. at 254; *James*, 715 F.2d at 807; *Bell* v. *Hettleman*, 358 F. Supp. at 392 n. 8; *Connecticut State Department of Public Welfare* v. *Department of HEW*, 449 F.2d 209, 216 (2d Cir. 1971).

James, 715 F.2d at 804: "[S]ection [4]02(a)(8), which details the disregards to be subtracted from gross monthly earnings, must be construed and interpreted in light of the regulations that preceded the OBRA amendments and that consistently, since at least 1969, to the present have treated income tax withholdings as a work-related expense."[7]

[7] The court below found that the above construction of Section 402(a)(7) "is in flat contradiction with the regulatory interpretation of [that section] embodied in 45 C.F.R. § 233.20(a)(3)(ii)(D)" (App., *infra*, 19a). That regulation provides that, in determining need, net income and "resources available for current use shall be considered." 45 C.F.R. 233.20(a)(3)(ii)(D). Despite the apparent inconsistency alleged by the court of appeals, the regulation, when read as a whole, does not conflict with the Secretary's position in this case. The regulation relied upon by the court below comes into play only "after all policies governing the reserves and allowances and disregard or setting aside of income and resources referred to in this section have been uniformly applied." *Ibid.* Moreover, 45 C.F.R. 233.20(a)(7)(i), which sets forth the method to be used by a state when it disregards earned income, provides that "[t]he applicable amounts of earned income to be disregarded will be deducted from the gross amount of 'earned income,' and all work expenses, personal and non-personal, will then be deducted. Only the net amount remaining will be applied in determining need * * *." Thus, 45 C.F.R. 233.20(a)(3)(ii)(D) merely provides that, after all allowances provided by Congress have been made, the net income remaining is to be evaluated to determine need. The regulation, therefore, is entirely consistent with the Secretary's current position.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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JANUARY 1984

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 82-4552, 82-4566, 82-4567, 82-4599
DC No. CV 81-4457-TEH
Filed: June 10, 1983

SANDRA TURNER, DEBRA SCRUGGS, JERRYLEAN BAKER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

JEROLD PRIOD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; ET AL., DEFENDANTS-APPELLANTS,

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA, DEFENDANT AND THIRD-PARTY PLAINTIFF/APPELLANT,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, THIRD-PARTY DEFENDANT/APPELLANT

OPINION

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

Argued and Submitted April 11, 1983

Before: ELY, SKOPIL and FERGUSON, Circuit Judges

FERGUSON, Circuit Judge:

In a case of first impression,[1] the State of California and the federal Department of Health and Human Services

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[1] There are no circuit court opinions currently reported on this issue. There are nine district court decisions, eight of which have been reported. Five of them rule for the plaintiffs and three for the defendants. *RAM* v. *Blum*, ____ F. Supp. ____, No. 82-Civ. 372 (RJW) (S.D.N.Y May 17, 1983) (summary judgment and permanent injunction for plaintiff) (cited hereinafter as *RAM II*); *Williamson* v. *Gibbs*, ____ F. Supp. ____, No. C83-104R (W.D. Wash. Mar. 28, 1983) (preliminary injunction for plaintiff), *appeal docketed*, No. 83-3725 (9th Cir. Apr. 7, 1983); *Bell* v. *Bottlemen*, 558 F. Supp. 286 (D.Md. 1983) (summary

appeal a grant of partial summary judgment against them and in favor of a state-wide class of workers receiving Aid to Families with Dependent Children (AFDC). The plaintiff class contends that the income used to calculate a welfare family's needs has never, and does not now, include the funds mandatorily deducted from a worker's paycheck for such items as income taxes because that money is never available to such families for the support of their children. The defendant governments reply that, while prior to 1981 the position of the plaintiffs may have been correct, the congressional AFDC amendments enacted in that year mandated this change in departmental procedures. After careful consideration of legislative history, administrative interpretation and congressional purpose, the district court ruled for the plaintiffs in a decision which has the effect of raising AFDC benefits paid in California an average of $83 a month for each of 45,000 recipient families. Looking primarily to congressional purpose, we affirm.

FACTS

Plaintiffs are the class of all past, present and future Aid to Families with Dependent Children recipients in California who have been or will be affected by a substantive change recently implemented in the AFDC program purportedly as a result of the enactment of the Omnibus Budget Reconciliation Act of 1981. Pub. L. No. 97-35, § 2302, 95 Stat. 357, 844-45 (1981), 42 U.S.C. § 602(a) (OBRA). The defendants are those California agencies and officials responsible for administering the California AFDC

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judgment for defendant), appeal docketed sub nom. Bell v. Mossinga, No. 83-1217 (4th Cir. Mar. 15, 1983); *Nishimoto v. Sunn*, ____ F. Supp. ____, No. 82-0359 (D. Hawaii Jan. 6, 1983) (summary judgment for plaintiff), *appeal docketed*, No. 83-1830 (9th Cir. Apr. 4, 1983); *Turner v. Woods*, 550 F. Supp. 603, (N.D. Cal. 1982) (permanent injunction for plaintiff) (affirmed in this opinion); *James v. O'Bannon*, 557 F. Supp. 631 (E.D. Pa. 1982) (summary judgment for defendant), *appeal docketed*, No. 82-1438 (3d Cir. July 21, 1982); *Dickenson v. Petit*, 536 F. Supp. 1100 (D. Me. 1982) (summary judgment for defendant), *aff'd on other grounds* (1st Cir. Nov. 1, 1982); *RAM v. Blum*, 533 F. Supp. 933 (S.D.N.Y. 1982) (preliminary injunction for plaintiff) (cited hereinafter as *RAM I*).

program. The state, in turn, has brought in the Secretary of Health and Human Services as a third-party defendant.

AFDC is a federal-state public assistance program authorized by the Social Security Act. 42 U.S.C. §§ 601-76. States which participate provide assistance to those needy families that include a dependent child as that term is defined within the Act. 42 U.S.C. §§ 606-07. A percentage of the funds expended by a state is reimbursed by the federal government. *Id.* at § 603. In return for the federal funds, the states are required to administer their programs pursuant to a state plan which is in accordance with federal statutory provisions and HHS regulations governing AFDC. *Id.* at § 602.

The amount of an AFDC family's monthly grant is intended to be limited to the exact amount which the family needs. The statutes and the regulations attempt to accomplish this purpose by requiring that an applicant-family's eligibility be determined by a careful assessment of the family's income and resources and a comparison of the sum of money thus found to be available to it monthly with a dollar figure (known in AFDC parlance as "the standard of need") that reflects the state's view of the amount necessary to provide for the essential needs such as food, clothing and shelter of a hypothetical family having the same composition as the family in question.[3] If it is found that the family has less than the standard of need, its AFDC grant will be the amount necessary to close the gap. *RAM v. Blum*, 533 F. Supp. 933, 937 (S.D.N.Y. 1982) (hereinafter *RAM I*).

Congress originally brought AFDC into being as part of the first Social Security Act in 1935. Title IV, Part A, 49 Stat. 62; 42 U.S.C. § 601-76. The statute describes itself as having three purposes: (1) to provide adequate income for needy families with dependent children, (2) to keep such families together, and (3) to encourage adult members of such families to get and keep jobs. 42 U.S.C. § 601; *Shea v. Vialpando*, 416 U.S. 251, 253 & 264 (1974). In 1981, when Congress extensively amended AFDC as part of OBRA, 95 Stat. 843-60, this language was left unchanged. The pur-

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[3] *See, e.g., Cal. Welf. & Inst. Code* § 11450 (West 1982).

pose of OBRA was to bring the rapid growth of federal spending under control. "Views of the Committee on the Budget," Senate Report No. 97-139 (June 17, 1981), *reprinted in* 1981 U.S. Code Cong. & Ad. News 397.

Plaintiffs challenge new regulations promulgated by the state Department of Social Services at the direction of HHS following the passage of OBRA. EAS §§ 44-113.21; 44-113.212-13.[3] The regulations change the method by which AFDC benefits are calculated; the state now considers mandatory payroll deductions such as income tax withholding to be "work expenses" incurred by AFDC recipients in obtaining income and subjects them to a maximum monthly $75 cut-off amount rather than allowing them to be deducted in their entirety prior to calculation of grant monies due as was the practice in the past. The practical effect of these regulations is to reduce aid payments to approximately 45,000 AFDC families within the state by the amount of the respective mandatory payroll deductions withheld from the wages of working recipients. In California the average amount of such a deduction is $83 a month.

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[3] SDSS—EAS §§ 44-113.211, 44-113.212 and 44-113.213, as amended November 10, 1981, read in relevant part:

> § 44-113.21 Computation of Net Nonexempt Earned Income for Aid to Families with Dependent Children
>
> .211 Determine the total amount of commissions, wages or salary earned as an employee during or applicable to the month (i.e., total income irrespective of expenses, voluntary or involuntary deductions). . .
>
> .212 Determine the total profit from self-employment by a recipient whose earnings are not exempted under Section 44-111.22 by offsetting the business expenses against the gross income from self-employment.
>
> a. Personal expenses such as income tax payments, lunches, entertainment and transportation to and from work are not classified as business expenses and shall not be deducted from gross income in determining total profit earned from self-employment. . . .
>
> .213 For each recipient, combine any total earnings determined in .211 above with any total profit determined in .212.

The Social Security Act, as amended, now requires states to perform a three-step calculation in order to determine AFDC benefits. (1) Determine income amount. (2) Subtract $75 for work expenses from that amount.[4] (3) Subtract the adjusted income amount derived from steps 1 and 2 from the dollar figure set in the state's calculation of level of need to determine the exact grant payment which will be made to the recipient. *RAM I*, 533 F. Supp. at 942; *Dickenson* v. *Petit*, 536 F. Supp. 1100, 1105-06 (D. Me. 1982).

Within this calculation framework, the parties disagree about the meaning of two key terms: "income" and "work expenses." After the 1981 OBRA amendments which, *inter alia*, instituted the standardized $75 work expenses disregard, 42 U.S.C. § 602(a)(8) (A) (ii), HHS instructed the state agencies that "income" was to be construed as "gross income" and that mandatory payroll deductions for such items as income tax, FICA and disability payments were properly characterized as "work expenses" to be grouped with such expenses as transportation and uniform costs. This entire group of expenses would then be subject only to the standard $75 disregard, regardless of the actual amounts expended or withheld. The state of California has embodied those HHS instructions in the regulations which are at issue in this case. Plaintiffs contend that "income" means *net* income and thus mandatory payroll deductions are non-income items. Plaintiffs argue that the Social Security Act requires the agencies to deduct both the mandatory tax deductions (at Step 1, determination of income) and the $75 disregard amount (at Step 2, subtract work expenses) in determining the size of the grant necessary to

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[4] For four months at the beginning of an AFDC period of eligibility, a working recipient will also receive a "work incentive" disregard of $30 a month plus one-third of the remaining *net* income. After the fourth month the recipient will not be eligible again until that individual has been off AFDC entirely for a period of twelve consecutive months. 42 U.S.C. § 602(a)(8)(A)(iv), (8)(iii). No aspect of this disregard is at issue in this case.

This four-month program is not to be confused with the old work incentive disregard enacted in 1967 and repealed by OBRA in 1981, the significance of which is discussed and illustrated *infra* at 26-28.

bring the recipient family up to the state's standard of need.

In 1982, a mother with three children who earned the minimum wage ($3.35 an hour) 40 hours a week, 4.3 weeks a month, would have had $59.52 withheld in California for federal and state income taxes, FICA and state disability insurance. If that amount is offset at Step 1 as plaintiffs urge, her income is determined a follows:

$3.25 × 172 hrs./Month =	$576.20
	−59.52
Income Actually Available	$516.68

At Step 2, she would still have $75 available to cover her work-related expenses for transportation, uniforms, union dues, etc., which would in turn reduce her income actually available for off-set against her AFDC grant monies to $442, in whole dollars. Assuming a state standard of need of $601, $442 would be subtracted from that amount, giving her a monthly AFDC grant of $159.

However, if the calculation is made as the governments here urge, her income at Step 1 is $576, and at Step 2 eighty percent of her work-related expenses allowance of $75 is eliminated by withholding. The working recipient will be left with an offset amount of $501 and only $15 to cover the expenses arising from her job. When the $501 is subtracted from the $601 standard of need, she receives $100 in grant monies.

The district court granted partial summary judgment for the plaintiffs, and entered a permanent injunction in their favor, ruling that mandatory payroll deductions were non-income items eliminated at Step 1 of the calculation process and therefore could not logically also be work-related expenses. *Turner* v. *Woods*, 560 F. Supp. 608, 610 (N.D. Cal. 1982). The court grounded its decision in the longstanding administrative policy of offsetting against grants only money actually available to AFDC families, and in the purposes of the AFDC Act. It ordered the state agency to cease including these deductions within "income," and enjoined

HHS from cutting off matching funds to California as a consequence of the state's compliance with the court's order. From this decision, the federal and state defendants appeal.

THE STATUTE:

The statute here at issue has been in the Social Security Act for over forty years. As originally passed in 1939, § 402(a)(7) read as follows:

> A state plan for aid and services to needy families must. . .
>
> (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child claiming aid to dependent children;

Social Security Amendments Act of 1939, Pub. L. No. 76-379, § 401(b), 53 Stat. 1360, 1379—80 (1939) (codified at 42 U.S.C. § 602(a)(7)(A)). In 1962, that section was amended as follows:

> (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income; . . .

In 1968, 42 U.S.C. § 602(a)(7) was further amended to link it with a revised 42 U.S.C. § 602(a)(8) which detailed disregards of earned income:

> (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children,. . . as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—
>
> (a) shall with respect to any month disregard—
>
> (i). . .; (ii) in the case of earned income of a dependent child . . . [or] a relative receiving such aid . . . the first $30 of the total of such earned income for such month plus one-third

of the remainder of such income for such month . . . .

In 1981, OBRA amended §§ 602(a)(7) and 602(a)(8) to provide as follows:

(7) except as may be otherwise provided in paragraph (8) . . . provide that the State agency—

(A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, . . .

* * *

(8) (A) provide that, with respect to any month, in making the determination under paragraph (7), the state agency—

(i) . . .; (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children . . . the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month); (iii) shall disregard from the earned income of any child, [or] relative . . . an amount equal to expenditures for care in such month for a dependent child . . . receiving aid to families with dependent children and requiring such care for such month, to the extent that such amount (for each such dependent child . . .) does not exceed $160 . . . .

The plaintiffs here contend that § 602(a)(7) "income" is net income and that therefore mandatory payroll deductions never reach the agency for consideration in determining an AFDC family's need. The defendants contend that § 602(a)(8)(ii) takes precedence over § 602(a)(7), that its "earned income" is gross income, and that the mandatory payroll deductions remain in the amount against which the agency offsets the first $75 of income per month. Our analysis must therefore consider, first, whether there is a difference between "income" under § 602(a)(7) and "earned income" under § 602(a)(8); and second, if there is, which

subsection controls the characterization of mandatory payroll withholding under the current statutory scheme.

ANALYSIS:

A. Standard of Review

The district court granted summary judgment of a pure question of law, the interpretation of a statute. There are no disputed facts. Therefore, the standard of review is *de novo*; the appellate panel applies the same test for summary judgment as did the district court. *Radobenko* v. *Automated Equipment Cor.*, 520 F.2d 540, 543 (9th Cir. 1975).

In construing a statute in a case of first impression, the courts look to the traditional signposts for statutory interpretation: first, the language of the statute itself; and second, its legislative history and the interpretation given it by its administering agency, both as guides to the intent of Congress in enacting the legislation.

B. Section 602(a)(7) Income

1. The Language

Although it is axiomatic that the place to begin in interpreting a statute is with the language itself, *Consumer Product Safety Commission* v. *GTE Sylvania*, 447 U.S. 102, 108 (1980), the language is not helpful here. The term "income" as used in § 602(a)(7) is not defined within the statute. As for contemporary, common meaning, *Perrin* v. *United States*, 444 U.S. 37, 42 (1979), the dictionary definition of income is ambiguous.[5]

2. Legislative History and Administrative Interpretation.

Evidence of congressional intent in enacting legislation is often found in legislative history, *see Nat'l R.R. Passenger Corp.* v. *Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974), and understanding legislative history is often aided by the history of administrative interpretations of a statute, *see Sarbe* v. *Bustos*, 419 U.S. 65, 74 (1974).

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[5] It reads, "the money or other gain received . . . by an individual . . . for labor or services." *Webster's New World Dictionary of the American Language*, 711 (2d college ed. 1972).

Section 602(a)(7) was added to the Social Security Act in 1939 when Congress realized that in initially enacting legislation to help families of needy children, it had neglected to provide that sources of income already available to the household should be taken into consideration and deducted from grants which would otherwise be made. P.L. 76-379, 53 Stat. 1379 (1939). The language was drafted by the Social Security Board.[8] H.R. Doc. No. 110, 76th Cong., 1st Sess. (1939) (Presidential report to Congress transmitting Social Security Board's "Proposed Changes in the Social Security Act"). In the hearings and floor debate which accompanied the amendment, concern was expressed that the needy not be penalized through inclusion in their income of sums not actually available to them. *See, e.g.*, testimony of Arthur Altmeyer, head official of Social Security Board, *Hearings Relative to the Social Security Amendments Act of 1939*, 76th Cong. 1st Sess. at 2254; remarks of Rep. Poage, 84 Cong. Rec. 6851, June 8, 1939. Although mandatory payroll deductions did not exist in 1939 in the form in which we know them now, because payroll withholding of income tax did not begin until 1943 and Congress therefore cannot have had these express deductions in mind, as early as 1937 there was modest payroll withholding for the Federal Insurance Compensation Act (FICA), and it seems fair to say that there was genuine congressional concern that resources counted against a family be actually available for its use.

The agency interpretations and behavior in this time period buttress the idea that Congress meant to offset only net income in determining assistance payments. In December 1940, the Social Security Board adopted a policy statement providing that § 602(a)(7)(A) income must "actually exist" and be "available to the applicant," defining availability as being 'actually on hand or ready for use when needed." In 1941, this policy was incorporated into an official manual used by the department for some period of time

[8] There have been three predecessor agencies to HHS—the Social Security Board, the Federal Security Agency, and the Department of Health, Education and Welfare. *RAM II*, slip op. at n.11.

to instruct the states on federal AFDC requirements. *Guide to Public Assistance Administration*, ¶ 202, at 1-2 (1942).[7]

From the middle 1950's to the present, there has been an agency regulation defining the term "income" as it appears in § 602(a)(7)(A) as "net income" *RAM I*, 533 F. Supp. at 942; *see, e.g., Lewis* v. *Martin*, 397 U.S. 552, 555 (1970).[9]

[7] The 1940 policy was expressed as follows:

> The policies and procedures adopted by the State agency shall be consistent with the following criteria for the consideration of income and resources in the determination of need:
>
> (a) The income or resource shall actually exist. Attributing a definite amount of income to sources or to kinds of property that produce either no income or less than the amount attributed to them is fictitious and such an imputed amount cannot properly be considered as an actual resource.
>
> (b) The income or resource shall be available to the applicant. To be regarded as available, an income or resource must be actually on hand or ready for use when it is needed. Consideration does not mean attributing a resource to sources from which income, contributions, maintenance, or support are not in fact available and forthcoming. Nor does it mean including as available for conversion to cash, ownership in real and personal property that is already meeting established requirements of the needy person or family.
>
> (c) The income or resource shall have some appreciable significance in meeting the requirements of the applicant. The amendments are not intended to require State agencies to bring inconsequential resources under scrutiny in establishing need, such as those resulting from casual earnings, small and unpredictable gifts of indeterminate value, or past income that will not continue in the future.
>
> (d) The income or resource shall be considered from the standpoint of its conservation and its maximum utilization in the interest of the welfare of the applicant. The effect of the resource on need should be taken into full consideration both in regard to the requirements that it provides on one hand, and the expenses that are associated with the applicant's obtaining, conserving, or utilizing it on the other.

It was reiterated nearly verbatim in the 1942 Manual. Bureau of Public Assistance, State of Administration, Part II, Plan of Operation, Recommended Criteria of Need (May 22, 1942) at 2.

[9] The 1967 version of the regulation quoted in *Lewis* v. *Martin*, 397 U.S. at 555, reads: "[O]nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis

It was republished *after* OBRA was enacted and now reads:

> A State Plan for ... AFDC ... must ... provide that, in determining need and the amount of the assistance payment, ... *net* income ... and resources available shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.20(a)(3)(ii)(D), *as amended by* 47 Fed. Reg. 5648, 5675 (Feb. 5, 1982) (emphasis added).

It is clear that the agency charged with the administration of this statute has long regarded it as dealing with net income exclusively. That interpretation has not changed in the wake of OBRA. Such an agency interpretation, while not binding, is entitled to substantial deference by a court. *United States* v. *Rutherford*, 442 U.S. 544, 553-54 (1979); *New York State Department of Social Services* v. *Dublino*, 413 U.S. 405, 421 (1973). That deference is heightened when the interpretation has remained consistent for long periods of time. *EEOC* v. *Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17 (1981). Here we deal with an uninterrupted, consistent interpretation stretching over forty years. Moreover, the practice of treating income for purposes of determining need as net income has received tacit legislative approval since Congress has never availed itself of the opportunity to amend this language even though it has altered this section at least three times—in 1962, 1967 and 1981. *See Saxbe* v. *Bustos*, 419 U.S. at 74 (congressional silence implies approval of "longstanding administrative construction").

This legislative and administrative history of the term income was regarded as largely dispositive by the district court, *Turner* v. *Woods*, 559 F. Supp. at 610-11, and was similarly weighted by the courts in *Williamson* v. *Gibbs*, No. C83-164R, slip op. at 3-6 (W.D. Wash. Mar. 28, 1983);

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will be taken into consideration in determining need and the amount of payment." The Supreme Court said the regulation clearly comported with the Act.

Nishimoto v. *Sunn*, No. 82-03591, slip op. at 4-5 (D. Hawaii Jan. 6, 1983); and *RAM I*, 533 F. Supp. at 942, 945. They reasoned that if "net income" was what was established at Step 1 of the AFDC procedure, the mandatory payroll deductions were already absent from the monies available prior to the application of the deductions specified at Step 2, by § 602(a)(8). We continue our analysis, however, because the defendants contend that the key statutory term is not "income" as it appears in § 602(a)(7) but rather "earned income" as it appears in § 602(a)(8)(ii).

C. Section 602(a)(8) "Earned Income"

1. The Language.

Defendants argue and the court in *Dickenson* v. *Petit*, 586 F. Supp., at 1111, reasoned that because §602(a)(7)(A) speaks in terms of "income" without qualification, while § 602(a)(8) speaks in terms of "earned income," § 602(a)(7)(A) must have a broader meaning: that it must include both earned and unearned income. The court continued,

> "Earned income," which includes tax withholdings, is thus a subset of the more general category of "income," *A fortiori*, "income" in section [6]02(a)(7) includes tax withholdings.

Id. The *Bell* court extended this line of reasoning further, saying:

> The word "income" is used in 42 U.S.C. § 602(a)(7). The words "earned income" are used in 42 U.S.C. § 602(a)(8). § 602(a)(7) has *since 1968* contained the direction that where § 602(a)(8) applies, *i.e.*, to earned income, calculations are to be made not under (a)(7) but under (a)(8).

Bell v. *Hettleman*, 558 F. Supp. 386, 393 (D. Md. 1983) (emphasis added). The "direction" to which the *Bell* court referred occurs at the beginning of § 602(a)(7) and reads: "except as may be otherwise provided in paragraph (8) ..., provide that the State agency ...."

Both the *Bell* and *Dickenson* courts ignore the historical fact that while the language which they *quote* has remained essentially unchanged since 1967, prior to the enactment of

OBRA in 1981, § 602(a)(8) dealt *only* with the old work incentive disregards which required additional deductions from household income and did not deal in any way with disregards of work expenses or offsets for mandatory tax withholding. In other words, before 1981 § 602(a)(8) did not act in any way whatever as a substitution for or limitation on § 602(a)(7). *See* full text of statutes at 7-9 *supra*.

Indeed, before OBRA was passed it was the intent of § 602(a)(8) to maximize the amount of earned income which AFDC recipients could keep, thereby making it as worthwhile as possible for them to obtain and keep employment. *See, e.g.* Notice of Final Policies and Requirements, 34 Fed. Reg. 1394 (1969); S. Rep., No. 744, 90th Cong., 1st Sess. (1967), in 1967-2 U.S. Code Cong. & Admin. News, pp. 2834, 2837; *RAM* v. *Blum*, No. 82 Civ. 372 (RJW) (S.D.N.Y. May 17, 1983) at n.32 (hereinafter *RAM II*). This goal was in part accomplished by statutorily using the term "earned income" and then regulatorily defining that term in as all-inclusive a fashion as possible, so that when the monthly $30 plus one-third disregard was calculated, as small an amount as possible was available for subtraction from the standard of need. *See* example *infra* at 26-28.

Prior to the enactment of OBRA, § 602(a)(7) had a complementary purpose. The statutory language required deduction of any reasonable expenses attributable to employment, *Shea*, 416 U.S. at 260, and the regulations spoke in terms of deducting from monthly grant monies only those funds actually available for the support of the child. This construction also maximized the amount of their earnings which AFDC recipients could keep.

In order that the two subsections work together to make the disregards as large as possible, it was necessary that the calculations of subsection 8 be performed prior to the subtractions of subsection 7; in that fashion, the recipient was entitled to offset one-third of the largest possible sum. Therefore the introductory language which *Bell* quotes came into the law in 1967. The purpose of that language in 1967 was certainly not to control all calculations applying to earned income, as the *Bell* court said, since any reasonable expenses attributable to the earning of income were controlled by § 602(A)(7) from 1967 until 1981. We therefore reject *Bell's* construction of this wording of the statute.*

2. Legislative History and Administrative Interpretation.

As noted above, when Congress enacted AFDC in 1935, it did not provide for reduction of its grants in aid to needy families when there were other sources of income available to the child. Congress eliminated this problem in 1939 by requiring that grants be referenced to recipients' other income sources. An AFDC recipient's grant was henceforth reduced by the exact amount of that individual's non-AFDC income. This served one AFDC purpose, that of providing for only those children in actual need, but it disserved another purpose, that of encouraging adult recipients to accept or retain paid work outside the home, because there was no allowance for costs of employment such as transpor-

* A similar historical misunderstanding led the *Dirlenson* court to mistakenly cite a 1971 opinion of this circuit in support of its construction of the term "income." 536 F. Supp. at 1111 n.7. In *Arizona Dep't of Public Welfare* v. *Dept's of Health, Education & Welfare*, 449 F.2d 456 (9th Cir. 1971), we required that disregards from earned income under § 602(A)(8)(A) be made from the gross amount and assumed a definition of that term which included mandatory payroll withholding. At that time that subsection of the statute and 45 C.F.R. § 233.20(A)(11)(v) applied only to the work incentive disregard provision subsequently repealed by OBRA. Because of this, the case has no bearing on the exclusion of mandatory payroll deductions and out-of-pocket work expenses; they were then governed exclusively by § 602(A)(7) and its implementing regulations. We observed then:

> [W]e think it entirely reasonable for the Secretary to interpret "earned income" in the Act's disregard provisions, 42 U.S.C. § 602(A)(8)(A), as referring to gross earned income. Nothing in the legislative history negates this broader reading of "earned income," and common usage supports it.

Id. at 470 n.21 (emphasis added). *Arizona* v. *HEW* thus construes a statutory provision which has passed out of existence and grounds its deference to the Secretary. We explain *infra* why we believe that deference is inappropriate on this issue in the instant case. Moreover, the legislative history briefly outlined above, while fully supportive of the *Arizona* v. *HEW* result, does not support the post-OBRA interpretation which the agency now advances in *Turner*. For all three of these reasons, we think that *Arizona* v. *HEW* is in no way helpful in attempting to understand the problem presented by *Turner*.

tation and uniform expenses. The Act in its 1939 form actually discouraged AFDC recipients from working because it left them with less money when they worked than it did when they did not. S. Rept. No. 1589, 87th Cong., 2d Sess., 17-18 (1962); H.R. Rept. No. 1414, 87th Cong., 2d Sess., 23 (1962); 1962 U.S. Code Cong. & Ad. News 1943, 1959-60. The federal agencies administering the program recognized this disincentive and urged, but did not require, states to allow credit for work-related expenses in determining eligibility. Social Security Board State Letter No. 4, "Facilitating Employment of Assistance Recipients Through Means of Sound Determination of Need" (April 30, 1942), republished in *Handbook of Public Assistance Administration* at § 3140 (1962); *Shea*, 415 U.S. at 259; *RAM II*, slip op. at 10 & n.22. However, in the 1939-1962 period neither the states nor the agency regarded mandatory payroll deductions as work expenses. *RAM II*, slip op. at 10-11 & nn. 22 & 23. For example, in 1960 HEW reported that the states used the term "gross income" to refer to "take-home pay" after payroll deductions and the term "net income" to refer to amounts available after "other employment costs have been recognized." HEW Report, "State Methods for Determining Need in the Aid to Dependent Children Program," Public Assistance Report No. 43 (May 1961) at 25, cited in *Bell* v. *Hettleman*, 558 F. Supp. at 891-92.

In 1962, Congress eliminated the disincentive to work by amending the statute to make the agency's optional practice mandatory for the states. The Act now provided that AFDC recipients must be given full credit for "work expenses." It instructed the state agencies to disregard "[a]ny expenses reasonably attributable to the earning of ... income" in the calculations made for purposes of determining AFDC benefits. 42 U.S.C. § 602(a)(8)(A)(iii)-(iii); *Shea*, 415 U.S. at 263-65.

In 1967, Congress moved to provide further encouragement for adult members of AFDC families to work. It enacted the so-called "work incentive disregard" by which the first $30 of gross income earned, plus the next one-third of gross income earned in each month, was disregarded in the

calculation of AFDC benefits. PL 90-248, 81 Stat. 821, 881 (1968). This created a substantial inducement for such adults to work as it allowed their pay to add greatly to their disposable income. (This is demonstrated in the illustrative calculations provided at 26-28 *infra*.)

Between 1962 and 1974, some twenty states moved to simplify the administration of the work expenses allowance by providing a flat sum of money to cover estimated average expenses rather than listing them individually for each claimant. However, in 1974, the Supreme Court required that the "work expenses" disregard be itemized for each AFDC family, holding that failure to do so (1) contradicted the plain language of the statute which allowed "*any*" expenses which were reasonable and (2) contravened a basic purpose of the act in that it discouraged employment in AFDC families. *Shea* v. *Vialpando*, 416 U.S. at 266. The Court stressed the second reason in holding that a flat sum was permissible for administrative reasons so long as provision was made to compensate those claimants whose work-related expenses exceeded the flat sum amount so that no claimant would suffer any loss of income by working. *Id.* at 265.[10]

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[10] The defendants rely heavily on *Shea* in their argument that mandatory payroll deductions are work related expenses and that such expenses must be taken from gross income. *See Bell* v. *Hettleman*, 558 F. Supp. at 891; *Dirkmaat* v. *Petit*, 536 F. Supp. at 1112 & 1114. We do not find *Shea* at all helpful to defendants, however. *Dirkmaat* does not really rely on *Shea*, but rather says only that *Shea* "implies" such an idea and asserts that its own decision is within "the penumbra" of *Shea*. *Id.* Even this cautious line is, we think, overstated; the only reference within *Shea* which even arguably characterizes such deductions as work expenses is grammatically ambiguous. *Shea*, 416 U.S. at 254-55 & n.3; *Turner*, 559 F. Supp. at 612-13 n.6.

The holding of *Shea*, that work expenses cannot be compensated for AFDC recipients in flat sum amounts because the Act required full compensation for any reasonably work-related expenses, has been legislatively overruled, leaving the case as doubtful authority at best. To the extent that *Shea* survives overruling by OBRA, it seems to us to stand for the twin propositions that in construing AFDC legislation one looks to its wording and the intent of Congress in its enactment. Thus, *Shea* seems to us to support the position of the plaintiffs in this litigation, as we explain in section D of this opinion *infra*.

In the post-*Shea* period, itemization fully reimbursed working AFDC recipients but created a substantial administrative burden. Several long agency documents and reports where mandatory payroll deductions are grouped with and referred to as "work related expenses" date from this post-1974 period. The defendants point to these documents as proof that such deductions are work-related expenses and either (1) always have been so, or (2) became so *after* 1974 and certainly were so regarded by Congress by the time OBRA was enacted in 1981. S. Rep. No. 77-139, 97th Cong., 1st Sess. 501-02 (1981); 1981 U.S. Code Cong. & Ad. News 396, 768-79.

By 1981, Congress had apparently had enough of the administrative difficulties and expenses and the problems of applicant falsification created by individual itemization of work expenses. "Senate Finance Committee Recommendations, Social Security Provisions," *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 768. It enacted OBRA, which overruled *Shea* by standardizing the "work expenses" disregard; instead of individual itemization, each working AFDC recipient now receives a standardized credit of $75 per month against income, regardless of the amount of the individual's actual work expenses. There is nothing in the legislative history of this amendment which definitively speaks to the issue of whether Congress intended to include mandatory payroll withholding in this change. Nonetheless, at least two witnesses did categorize mandatory payroll deductions as work-related expenses in their testimony at legislative committee hearings.[11] However, testimony of witnesses before congressional committees prior to passage of

[11] *See* testimony of Christine Pratt-Marston for the National Anti-Hunger Coalition, *Administration's Proposed Savings in Unemployment Compensation, Public Assistance, and Social Services Programs: Hearings Before the Subcommittee on Public Assistance and Unemployment Compensation of the Committee on Ways and Means, House of Representatives*, 97th Cong., 1st Sess. 88-89 (1981); Testimony of Marian Wright Edelman, President, Children's Defense Fund, *Spending Reduction Proposals, Hearings Before the Committee on Finance, United States Senate*, Part 1, 97th Cong., 1st Sess. 277 (1981). Portions of their testimony are reprinted in *Bell* v. *Hettleman*, 558 F. Supp. at n.16.

legislation generally constitutes only "weak evidence" of legislative intent. 2A C.D. Sands, *Statutes and Statutory Construction, A Revision of the Third Edition of Sutherland on Statutory Construction* § 48.10 (4th ed. 1973).

Since 1969 there has been an agency regulation defining § 602(a)(8) "earned income" as gross income. Its current, post-OBRA form reads:

> the total amount, irrespective of personal expenses, *such as income-tax deductions*, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

45 C.F.R. § 233.20(a)(6)(iv), *as amended in* 47 Fed. Reg. 5648, 5676 (1982) (emphasis supplied).

Arguing judicial deference to an agency interpretation, *Quern* v. *Mandley*, 436 U.S. 725, 738 (1978), the defendant governments contend that this alone should be dispositive. However, as we have indicated:

> [A]n agency's interpretations are not conclusive, and the courts are not bound by them. *Social Security Board* v. *Nierotko*, 327 U.S. 358, 369 (1946). In particular, the deference due an administrative interpretation depends upon its consistency with earlier agency pronouncements, *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974), the purpose and wording of other agency regulations, *Pacific Coast Medical Enterprises* v. *Harris*, 633 F.2d 123, 131 (9th Cir. 1980), and the purposes of the relevant statutes. *United States* v. *Larionoff*, 431 U.S. 864, 873 (1977).

McCoog v. *Hegstrom*, 680 F.2d 1280, 1284 (9th Cir. 1982). As mentioned, the term gross income has been differently defined at different times in the history of agency administration of AFDC. *Bell* v. *Hettleman*, 558 F. Supp at 391-92. Thus, the simple definition of the term is inconsistent with earlier pronouncements. More important, the regulation, as the agency proposes to administer it, is in flat contradiction with the regulatory interpretation of 42 U.S.C. § 602(a)(7) embodied in 45 C.F.R. § 233.20(a)(3)(iii)(D), which has been agency policy for forty

years, as discussed *supra* in Section B. Finally, the proposed application of this regulation undermines the purposes of both OBRA and the AFDC Act, as we discuss in Section D *infra*. For these reasons, deference is not appropriate in this context.

In our view, *if* mandatory payroll deductions enter into income at all, they must be treated as work-related expenses subject to the $75 ceiling enacted by OBRA, because no separate disregard for payroll withholdings exists. It is this argument which the *Dirkenson*, *O'Bannon*, and *Bell* courts found persuasive. *Bell* v. *Hettleman*, 558 F. Supp. at 391-92; *James* v. *O'Bannon*, 557 F. Supp. at 635; *Dirkenson* v. *Petit*, 536 F. Supp. at 1110-15. We, however, reject the original premise of the argument that such withholding enters into income.

The 1981 Congress certainly had the power to change the intent of the legislation enacted by the 1939 and 1962 Congresses, that payroll withholding not be counted as available to the claimant. But did the 97th Congress do so? This long history seems inconclusive. Allowances for mandatory payroll deductions were widely made before 1962, *RAM II*, slip op. at 10-11 & n.22, either on the strength of the agency's interpretation of the § 602(a)(7) "income available to the applicant" standard or, perhaps, on the basis of the statutory purpose alone. 42 U.S.C. § 601. In the legislative history of the 1962 amendment, which first brought "work related expenses" into AFDC law, there is no reference to mandatorily withheld taxes as work-related expenses. *RAM I*, 533 F. Supp. at 946. The *RAM I* court observed that such reference was unnecessary with regard to this amendment since the deductions were already being made under the "net income" provisions of 602(a)(7)(A). *Id.* Moreover, after the amendment passed, HEW prepared the *Handbook of Public Assistance Administration* for distribution to the states to aid them in calculating allowable work-related expenses; mandatory payroll deductions do not appear on the lists provided although they were routinely deducted from income at that time. *RAM II*, slip op. at 10-11; *Bell* v. *Hettleman*, 558 F. Supp. at 391.

Between 1962, when the work expenses disregard was mandated, and 1974, when *Shea* was decided, the two groups of items were treated differently in the states which allocated flat sums to cover expenses; in these states mandatory payroll deductions continued to be individually itemized in this period. *See, e.g.*, the Colorado plan described in *Shea*, 416 U.S. at 256; *RAM II*, slip op. at 12-13 & n.26. The district court in the instant case believed that this practice evidenced their conceptually different origin in the law as "non-income items." It reasoned that only in the post-*Shea* period did it become "administratively convenient" to group the two together since both were deducted from gross income and their order and grouping made no difference in the calculation of AFDC benefits as performed at that time. *Turner* v. *Woods*, 559 F. Supp. at 612.

In summary, surviving agency records seem to indicate that, prior to 1962, such deductions were seen as funds not available to the recipient and thus were categorized as non-income items. The total absence of reference to mandatorily withheld taxes in the legislative history of the 1962 agency-initiated congressional amendment and in the subsequent agency publications, and the 1962-74 bookkeeping practices of the only states which would have had any reason to differentiate between the two types of items, indicate that prior to the *Shea* decision, the two items continued to be seen as conceptually different. It is only in the post-*Shea* era, when that difference becomes irrelevant because both sums are being deducted in full from total earned income, that the agency and the states apparently began to refer to mandatorily withheld payroll deductions as work-related expenses. It goes without saying that a change in the way in which an agency administers a statute does not change the intent with which Congress enacted it. The defendants appear to argue here that the agency practice became so notorious between 1972 and 1981, and the documents presented to Congress in 1981 were so clear in their references to such taxes as work-related expenses, that the 97th Congress intentionally chose to repeal *sub silentio* the "income available" standard of the 76th Congress. The change in agency practice seems established. Whether Congress had

adequate notice of that change is unclear. What is clear is that Congress had no notice of the fact that the change would create a conflict with longstanding and familiar interpretations of § 602(a)(7). We therefore refuse to hold that Congress has repealed a forty-year-old policy by implication. We are aided in reaching this conclusion by our consideration of the underlying purposes of the two statutes which follows.

B. Congressional Purpose

As noted earlier, the legislative and administrative histories are usually pursued in an effort to ascertain something more important, the purpose of Congress in enacting a specific piece of legislation. If a court can ascertain that purpose, it is usually dispositive of an issue of statutory construction. *Chapman* v. *Houston Welfare Rights Organization*, 441 U.S. 600, 608 (1979); *Philbrook* v. *Glodgett*, 421 U.S. 707, 713-14 (1975). In this instance, we have two such acts, AFDC and OBRA.

In the case of AFDC, the statute itself states its purposes. It reads in relevant part:

> For the purpose of authorization of appropriations ... enabling each State to furnish financial assistance ... to needy dependent children and the parents or relatives with whom they are living ... and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection ....

42 U.S.C. § 601. Those purposes have been construed and commented upon at length by the Supreme Court. *Sheu* v. *Weinberger*, 416 U.S. at 253 (*see* discussion *supra* at 19 & n.10). *Sheu* ultimately teaches two things: In construing AFDC legislation, look to (1) the language and (2) the underlying purposes of the Act. In *Sheu*, the Court struck an agency-approved practice in part because it undermined one of the Act's principal purposes; it discouraged welfare recipients from working by failing to reimburse them fully for their working expenses. *Id.* at 255. The statutory language embodying the purposes of AFDC stands today in

the Act as it was at the time of *Sheu*. It was not amended by OBRA in 1981.

The Omnibus Budget Reconciliation Act was framed in order to restrain federal spending, specifically by reducing its growth, according to the House Budget Committee Report. 1981 U.S. Code Cong. & Ad. News at 398. Without citation of authority, the Third Circuit has recently observed:

> The primary purpose of the OBRA amendments to the AFDC program is to reduce or eliminate welfare benefits for those considered by Congress to be less needy than those completely without resources—persons or households that have available other sources of income or resources with which to support themselves.

Philadelphia Citizens in Action v. *Schweiker*, 669 F.2d 877, 879 (3d Cir. 1982). There are actually two Congresses and two sets of intentions at issue here; however, the 97th (OBRA) Congress, while making the changes in benefits which we have discussed at length, also left intact the earlier language of the 76th Congress embodying the statutory purposes. Therefore it seems incumbent upon a court to reach a reading which accommodates both purposes as well as possible. We hold that the district court's reading, with minor clarification, does that.

Granting *arguendo* that OBRA's purposes were as stated by the Third Circuit, the congressional AFDC amendments which are not at issue in this case fully accomplish them. The major money-saving change in this aspect of AFDC arises out of the virtual elimination of the work incentive allowance. From 1967 to 1981, a working AFDC recipient was permitted to disregard $30 plus one-third of *gross* income *each* month. For someone employed full time at the minimum wage, this amounts to a sum of several hundred dollars monthly. Under OBRA, this disregard may be taken only on *net* income, and then for only the first four months *of eligibility*; a recipient may not again utilize this disregard until she has been off AFDC for a period of twelve consecutive months. Secondly, under pre-OBRA law, child care expenses were deductible in full. Now they are subject to a maximum of $75 per month. None of these

changes are disputed here, and as the example below indicates, they represent a substantial reduction of benefits.

A set of calculations based upon the income of one class member, Catherine Bass, will illustrate these different systems of calculation and demonstrate why the district court ruling best embodies the various goals of the different pieces of legislation here at issue.

Ms. Bass has five children. She is eligible for a grant of $771 per month if she does not work at all. She works full time and earns $730 per month. She has child-care expenses of $235 per month, other actual work-related expenses of $180 per month, and has $84 a month withheld mandatorily from her paycheck.

Under the pre-OBRA AFDC provisions, the agency would first have deducted the work-incentive allowance, $30 plus one-third of her gross income, subtracting $273 from her income of $730. Then it would have subtracted $84 for mandatory withholding and $415 for her actual work expenses plus child care. That leaves Ms. Bass with a total net income of minus $42; therefore, none of her working income would have been offset against her grant monies, and she would have collected her full grant amount of $771 a month. That would bring $1501 into her household each month; actual work-related expenses and withholding amount to $499, leaving her with $1002 as spendable income. Since she would have received $771 for doing *nothing*, her financial incentive for a full month of work is $231.

Under the post-OBRA method of calculation which the governments espouse, Ms. Bass is still eligible for $771 and still earns $730. She does not receive the work-incentive disregard nor are the mandatory deductions subtracted. She is allowed to subtract her child-care expenses of $235 and take the $75 work-expenses disregard, which reduces her income to $420. When the state offsets this against the $771 grant amount, that qualifies her for $351 in AFDC funds, so that a total of $1081 comes into her household each month. However, she has actual work-related expenses of $415 and $84 in payroll withholding, which when subtracted from the $1081 amount, reveal that she is receiving $582 a month for working when she could get

$771 from the state simply by staying home. It is costing her $189 monthly to go to work.

Under the construction of the Act adopted by the district court, Ms. Bass subtracts $84 in payroll deductions from her $730 salary, leaving her with $646. She then subtracts an additional $75 for work-related expenses and $235 in child care, leaving her with the sum of $336 to offset against the maximum grant of $771. The state will pay her $435 a month in grant monies, bringing a total of $1165 into her household. The $499 she actually spends ($415 plus $84) subtracted from that amount leaves her with income of $666, which is $105 less a month than she would receive for staying at home. While she is still penalized for working, the penalty is less; and since the defendants contend that California working expenses are very high,[18] it is possible that nationally this method of calculation does not actually fine the recipient for working.[19] In any event, this method of calculation provides *less* of a disincentive to work than does that advanced by the government. If the court is to give any meaning at all to the purposive language which remains within the AFDC Act, it would seem that adoption of this method of calculation is required.

This construction also best implements the purposes of OBRA to "reduce welfare benefits" and restrain the growth

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[18] *See, e.g.*, California Department of Social Services, AFDC Social and Economic Characteristics for Families Who Received Aid during July 1980, Program Series Information Report 1982-01, Table 18 (January 1982), which reports that in July 1980, average monthly transportation for California's working AFDC recipients was $48. That figure, as well as being three years old, was low to begin with. *Green v. Obledo*, 29 Cal. 3d 126, 139 (1981).

[19] According to the Center for the Study of Social Policy, as extensively reported by the U.S. Civil Rights Commission in May 1983, under the present method of calculating AFDC benefits established under the 1982 post-OBRA regulations, AFDC recipients in twelve states, including California, lose money if they work. Those in another nine states earn less than $10 in extra income for a full month of work. In only four states was the amount of increased income greater than $100 and that occurred because the standard of need is set at a low level in those states. United States Commission on Civil Rights, *A Growing Crisis: Disadvantaged Women and Their Children* (May 1983) at 28-29 & Table 3.8.

of government spending since it is important to remember that the choice is *not* between making higher or lower benefit payments. The state standards of need are set. *See, e.g.*, Cal. Welf. & Inst. Code § 11450. The choice is between working and not working. If the disincentive provided is strong enough, there is no reason to believe that AFDC recipients will work in order to pay handsomely for the privilege. If that eventuality materializes, the result of the statutory construction which the governments urge will be a rise in government spending through increased welfare payments—an end result which would contravene the intent of both the 76th and the 97th Congresses. *RAM II*, slip op. at 17. We therefore hold that mandatory payroll deductions for taxes, i.e., local, state and federal income taxes, Social Security, FICA, state disability programs and equivalent items and programs, are not income for purposes of AFDC calculations performed pursuant to 42 U.S.C. §§ 602(a)(7) and 602(a)(8).

The state appellants contend that the district court holding fosters disparity and invites fraud. They stress the possibility of fraud in the number of dependents declared for tax purposes by AFDC recipients and the inequity of allowing an offset for such items as union dues and uniforms when mandatorily withheld when there is no such allowance for a worker who must pay those same sums out of income actually received.[14] In California past AFDC practice has required recipients to report the number of dependents whom they have claimed for tax purposes to the state agency, and that number had to be congruent with the number claimed for AFDC purposes. EAS § 44-133.241(a) (re-

[14] The state asserts as well that if the district court interpretation of the law is implemented, the OBRA amendments will cost the government money rather than saving it. It relies on an affidavit of HHS AFDC official Linda S. McMahon to buttress this assertion. The affidavit is unclearly worded and, perhaps because of this, seems internally contradictory. Compare paragraph #4 with paragraph #5. Moreover, the assertion which the state and Ms. McMahon make is patently untrue in that they make no allowance for OBRA's chief economizing feature, the repeal of the old work incentive disregard. *See* example *supra* at 25-28. *See Bell v. Hottlemon*, 558 F. Supp. at 393-94 n.12 (similar affidavit not relied upon).

pealed by Manual Letter 81-65, November 10, 1981). That regulation could be reinstated with minimal difficulty should it be needed. Moreover, a recent California Court of Appeals decision makes income tax refunds income for AFDC purposes,[15] a categorization which could serve as a second check on fraud. When one considers as well that each AFDC recipient is required monthly to show his payroll check stub to the country welfare agency, EAS § 40-181.2, we see little possibility of fraud in this area.

With regard to the non-governmental deductions, we see nothing in the district court opinion which denominates them as non-income items. The district court speaks of mandatory payroll withholding in terms of "federal, state and local income taxes, Social Security taxes (F.I.C.A.), and state disability," *Turner*, 559 F. Supp. at 616, and the appellees speak of "mandatory *tax* withholding." We believe the *Turner* holding to be limited to these and equivalent areas. Most workers who receive payroll checks must pay governmentally withheld amounts for these purposes, and the amounts are easily verified. By limiting the district court's ruling in this fashion, if indeed we limit it at all, we conform to the intent of Congress in enacting OBRA, which was to make the handling of AFDC administratively simpler and less time consuming. Since payroll stubs of all working AFDC recipients may already be reviewed monthly, we agree with the district court in its characterization of mandatory payroll withholdings as "paradigmatic examples of items *not* subject to applicant falsification and not at all difficult for administering states to calculate." *Turner v. Woods*, 559 F. Supp. at 613 (emphasis in original).

In summary, legislative and administrative history demonstrate that "income" for purposes of § 602(a)(7) should be construed as income net of mandatory payroll deductions. To construe § 602(a)(8) as the defendants urge would require us to determine that Congress repealed a long-standing policy by implication; we decline to do so. Both the

[15] *Turner*, 559 F. Supp. at 615-16.11; *Vasconi v. Woods*, 181 Cal. App. 3d 1025, 182 Cal. Rptr. 735 (Cal. Ct. App. 1982). *hearing & alternative writ of mandate granted* (Aug. 9, 1982) (Nos. LA 31617 & LA 31602).

purposes of AFDC embodied in the statute, and the purposes of OBRA as stated in the legislative history and expanded upon in the case law, are best served by a holding that "income" for AFDC purposes does not include mandatory payroll withholding for items such as local, state, and federal income taxes, FICA, state disability and equivalent governmental programs. The district court is AFFIRMED.

APPENDIX B

United States District Court,
N.D. California.

July 29, 1982

No. C 81-4457 TEH.

SANDRA TURNER; DEBRA SCRUGGS; JERRYLEAN BAKER; AND CALIFORNIA COALITION OF WELFARE RIGHTS ORGANIZATIONS; ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS,

v.

MARION J. WOODS, INDIVIDUALLY IN HIS OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; KYLE MCKINSEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; MARY ANN GRAVES, INDIVIDUALLY AND IN HER CAPACITY AS DIRECTOR OF THE DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA; AND THE DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA, DEFENDANTS.

OPINION AND ORDER

THELTON E. HENDERSON, District Judge.

In this case involving the calculation of welfare benefits under California's Aid to Families with dependent Children [AFDC] program, the question presented is whether mandatory payroll deductions, such as income tax withholdings, constitute "work expenses" subject to the $75.00 limit of the standardized work expenses exclusion from gross income, or whether they constitute non-income items properly excluded from gross income in their entirety.

I.

PROCEDURAL POSTURE OF THE CASE

The Court has jurisdiction of the action pursuant to 28 U.S.C. §§ 1331, 1343(3) and 1343(4), and 42 U.S.C. § 1983.

Plaintiffs are the class of all past, present and future California AFDC recipients who have been or will be affected by a substantive change recently implemented in the AFDC program as a result of the enactment of the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35 § 2302, 95 Stat. 357, 844-45 (1981) (codified at 42 U.S.C. § 602(a) (1976 and Supp.1982) [hereinafter cited as "OBRA"]. The class representatives are Sandra Turner, Debra Scruggs, Jerrylean Baker, and the California Coalition of Welfare Rights Organizations. The individual representatives have been adversely affected by the recent substantive change in California's AFDC program. The Coalition is a statewide association whose membership includes AFDC recipients.

Defendants are Marion J. Woods, Kyle McKinsey, Mary Ann Graves, and the Departments of Social Services and of Finance of the State of California. Woods and McKinsey are Director and Deputy Director of the Department of Social Services. Graves is Director of the Department of Finance.

The third-party defendant is Richard J. Schweiker, Secretary of the United States Department of Health and Human Services [DHHS].

The substantive change in the AFDC program whose legality plaintiffs challenge is implemented by California Department of Social Services regulations EAS 44-113.211, 44-113.212 and 44-113.213, as amended November 10, 1981, in the wake of OBRA. These regulations change the methods by which AFDC benefits are calculated: the state defendants, guided by the third-party defendant's instructions, now consider mandatory payroll deductions as "work expenses" incurred by working AFDC recipients in obtaining "income," rather than as non-income items.

Plaintiffs move for a permanent injunction restraining defendants from including mandatory payroll deductions within the definition of "income" for purposes of determining AFDC eligibility and calculating AFDC grants.[1] De-

[1] As is hopefully made clear *infra*, p. 609, items excluded from "income" under the AFDC statutes are also, as a logical matter, excluded from "work expenses."

fendants in turn move for summary judgment against the third-party defendant, binding the third-party defendant to any judgment issued against defendants on plaintiffs' motion.

After considering the memoranda of all parties, and the oral argument of counsel, including the memoranda and argument of the third-party defendant, for the reasons hereinafter stated, the Court grants both motions.

II.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Defendants argue persuasively that, as a practical matter, they are bound to follow the third-party defendant's instructions regarding calculation of AFDC benefits. The AFDC program is one of several joint federal-state public assistance programs. Each participating state administers benefits according to a state plan which must be approved by the third-party defendant, DHHS Secretary Schweiker. If the state plan received DHHS approval, the federal government reimburses the state for a large percentage of the benefits paid and the administrative costs incurred. But if the state plan does not receive DHHS approval, the state must foot its AFDC bill alone. *See* 42 U.S.C. §§ 603-04 (1976 and Supp.1982).

With respect to the issue raised by plaintiffs' motion in the instant case, the Secretary has taken the position that mandatory payroll deductions should be considered "work expenses" for purposes of calculating AFDC benefits. *See* Declaration of John J. Klee, Jr., ¶2 (May 27, 1982). The Secretary has stated that a state plan which treats mandatory payroll deductions as non-income items rather than as work expenses would be violating DHHS regulations, *id.*, and presumably such a state plan would not receive DHHS approval absent a court order. For this reason, the Secretary has not opposed defendants' motion for summary judgment against DHHS in the event that plaintiffs' motion for a permanent injunction is granted.

Since this Court is granting plaintiffs' motion, *infra*, pp. 607-615, defendants' motion for summary judgment is also granted.

Since this Court is granting plaintiffs' motion, *infra* pp. 607-615, defendants' motion for summary judgment is also granted.

II.

PLAINTIFFS' MOTION FOR A PERMANENT INJUNCTION

A. BACKGROUND

Congress enacted the AFDC program under Title IV, Part A, of the Social Security Act of 1935, Pub.L. No. 271, 49 Stat. 627-29 (1935) (current version at 42 U.S.C. §§ 601-676 (1976 and Supp.1982)). The AFDC program serves two Congressional purposes: to provide for the needs of families with dependent children, 42 U.S.C. § 601 (1976), and to encourage AFDC families to secure and retain employment, *Shea v. Vialpando*, 416 U.S. 251, 264, 94 S.Ct. 1746, 1755, 40 L.Ed.2d 120 (1974). Exploration of the complex statutory scheme by which these twin goals are implemented is significantly aided by an historical approach.

Pursuant to the 1935 enactment of the Social Security Act, participating states established statewide "standards of assistance." The "standard of assistance" is the minimum dollar amount that, in the state's judgment, an AFDC family of a given size requires to provide for its essential needs. *Shea v. Vialpando*, 416 U.S. at 253, 94 S.Ct. at 1750. The "standards of assistance" established a mechanism for states accurately to provide for the needs of non-working families with dependent children, but the Social Security Act did not in its original form require that states decrease the size of grants paid to needy families with other income sources. Hence the Act created at least the theoretical possibility that working recipients might be overpaid. *See Hearings Relative to the Social security amendments Act of 1939*, 76th Cong., 1st Sess. at 2254 (1939) (colloquy between Representative Duncan and Arthur Altmeyer).

In 1939, Congress responded to this over-payment problem by requiring that grants must be referenced to recipients' other income sources:

> the state agency shall, in determining need, take into consideration any ... income and resources [other than AFDC payments] of any child claiming [AFDC].

Social Security Amendments Act of 1939, Pub.L. No. 76-379, § 401(b), 53 Stat. 1360, 1379-80 (1939) (codified at 42 U.S.C. § 602(a)(7)(A) (1976 and Supp.1982)). In other words, each AFDC recipient's grant was to be decreased by an amount exactly corresponding to the recipient's non-AFDC income. This income-referencing requirement served the first of the twin AFDC goals mentioned above, by ensuring that working recipients were not paid more AFDC benefits than they actually needed. However, in practice the income-referencing requirement disserved the second purpose of encouraging work, because working AFDC recipients received nothing extra to cover the costs—such as, for example, transportation and special clothing—incurred in obtaining non-AFDC income. Since non-working AFDC recipients did not incur these costs, the 1939 Amendments Act left working AFDC recipients worse off than non-working AFDC recipients. See Social Security Board State Letter No. 4, "Facilitating Employment of Assistance Recipients Through Means of Sound Determination of Need" (April 30, 1942), published in *Handbook of Public Assistance Administration* at § 3140 (1962); *Hearings on Public Assistance Act of 1962 before the Senate Committee on Finance*, 87th Cong., 2d Sess. 152 (1962) (testimony of HEW Secretary Ribicoff); S.Rep. No. 1589, 87th Cong., 2d Sess. 17-18, *reprinted in* 1962 U.S. Code Cong. & Ad.News 1943, 1959-60.

In 1962, Congress solved this underpayment problem by mandating that "any expenses reasonably attributable to the earning of ... income" were to be disregarded from gross income in calculating the amount of the recipient's "income" to be used in decreasing AFDC benefits. In other words, "work expenses" operated as a credit for AFDC recipients.[9] Public Welfare Amendments Act of 1962, Pub.L.

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[9] Congress subsequently mandated the "work incentive" disregard to help solve the same underpayment problem. Social Security Amendments of 1967, Pub.L. No. 90-248, § 202(b), 81 Stat. 821, 881 (1968), *amended by* OBRA, *supra*, p. 606 § 2301, 95 Stat. at 944 (codified at

No. 97-543, § 1961(b), 76 Stat. 172, 189 (1962), *amended by* OBRA, *supra*, p. 606, § 2302, 95 Stat. at 844-45 (codified at 42 U.S.C. § 602(a)(8)(A)(ii)-(iii) (1976 and Supp. 1982)). The Supreme Court interpreted this "work expenses" disregard to require participating states to provide for itemization of work expenses by each AFDC family. *Shea v. Vialpando*, 416 U.S. at 260, 94 S.Ct. at 1753. Itemization of work expenses ensured that AFDC families were no longer discouraged from working, but in practice led to two new problems: administrative burden and applicant falsification. S.Rep. No. 97-139, 97th Cong., 1st Sess. 501-02, reprinted in 1981 U.S.Code Cong. & Ad. News 396,788.

In 1981, Congress met these new problems by *standardizing* the "work expenses" disregard: instead of itemizing their individual work expenses, working AFDC recipients now receive a standardized $75.00 per month as a credit against their gross income, regardless of the amount of their actual work expenses. OBRA, *supra*, p. 606, § 2301, 95 Stat. at 844-45 (codified at 42 U.S.C. § 602(a)(8)(A)(ii)-(iii) (1976 and Supp.1982)).[5] Thus in its present form the Social security Act requires participating states to calculate benefits for working AFDC recipients according to a four-step formula: *first*, the state determines the family's "income"; *second*, the state subtracts from income the standardized "work expenses" disregard; *third*, the state subtracts from income the "work incentive" disregard; and *fourth*, after determining the applicable "standard of assistance," the state uses the adjusted "income" amount obtained by the first three steps to decrease the working recipient's grant. *RAM v. Blum*, 533 F.Supp. 903 at 942 (S.D.N.Y. 1982); *Dirkmaat v. Petit*, 536 F.Supp. 1100 at 1105-06 (D.Me.1982); *James v. O'Bannon*, 557 F.Supp. 631 at 635 (E.D.Penn.1982). The precise meanings of two of the

42 U.S.C. § 602(a)(8)(A)(ii) (1976 & Supp. 1982), but the "work incentive" disregard is not relevant to resolution of the issue presently before the Court.

[5] The 1981 Congress also modified the "work incentive" disregard, so that it applies only during the first four months that an AFDC family has work income. OBRA, *supra*, p. 606, 95 Stat. at 844-45 (codified at 42 U.S.C. § 602(a)(8)(A)(ii) (1976 and Supp. 1982)).

terms of art used in this formula—"income" and "work expenses"—lie at the core of the mandatory payroll deductions issue presently before the Court.

B. THE ISSUE

Plaintiffs contend that "income" in the AFDC statutes means *net* income, and thus that mandatory payroll deductions are non-income items. Since as a logical matter non-income items cannot be "work expenses" disregarded from income,[6] in plaintiffs' view "work expenses" are limited to out-of-pocket expenses such as transportation and special clothing. Consequently, plaintiffs argue that the Social Security Act requires participating states to subtract from a working AFDC recipient's *gross* income *both* mandatory payroll deductions and the newly-standardized $75.00 per month "work expenses" disregard, before using this adjusted "income" amount to decrease AFDC benefits.

By contrast, the Secretary has instructed defendants that "income" in the AFDC statutes means *gross* income, and thus that mandatory payroll deductions are income items—properly characterized as "work expenses." In the secretary's view, "work expenses" include both *out-of-pocket* expenses and mandatory payroll deductions. Consequently, apart from the "work incentive" disregard (which is not at issue), defendants subtract from a working AFDC recipient's gross income only the newly-standardized $75.00 per month "work expenses" disregard, before using this adjusted "income" amount to decrease AFDC benefits.

[6] An item must be "income" before it can be disregarded from income. *See RAM v. Blum*, *supra*, p. 699, at 940.

C. STANDARD OF REVIEW

The issue in this case, then is one of statutory interpretation: what do the words "income" and "work expenses" in the AFDC statutes mean? The starting place in any problem of statutory construction is the literal language of the statutes. *Consumer Product Safety Comm'n v. GTE Sylvania*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980). Unfortunately, no provision of the Social Security Act of 1935, or of the amending Acts of 1939, 1962 or 1967, or of OBRA has ever defined "income" or "work expenses"; nor does anything in the context of the AFDC statutes in which these terms appear guide us in determining their meaning.[5]

In the absence of any intrinsic statutory direction, we must rely upon extrinsic aids to statutory construction in determining whether or not Congress intended mandatory payroll deductions to be disregarded from gross income in addition to the standardized $75.00 per month "work expenses" disregard. Two types of extrinsic aids have materially assisted us in determining that Congress intended disregard of mandatory payroll deductions over and above the work expenses disregard: the legislative and administrative history, and the congressional purpose underlying the AFDC statutes. In analyzing these materials, the Court acknowledges its large debt not only to the excellent papers provided by the parties to this action, but also to the exhaustive research manifest in the carefully-reasoned opinions of the three district courts which have previously considered the issue before us now. *See RAM v. Blum*, *supra*, p. 609 (concluding that mandatory payroll deductions are non-income items and therefore must be disregarded over and above the "work expenses" disregard); *Dickerson v.*

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[5] As the Supreme Court has observed, the AFDC program is an area to which Congress "has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." *Rosado v. Wyman*, 397 U.S. 397, 412, 90 S.Ct. 1207, 1216, 25 L. Ed.2d 442 (1970).

Petit, *supra*, p. 609, and *James v. O'Bannon*, *supra*, p. 609 (both concluding that mandatory payroll deductions are work expense items which therefore should *not* be disregarded in addition to the "work expenses" disregard). Much of what follows is culled from these cases.

D. LEGISLATIVE AND ADMINISTRATIVE HISTORY

Persuasive evidence of Congress' intent in drafting statutory language is frequently found in legislative history, *see Nat'l R. Passenger Corp. v. Nat'l Ass'n of R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974), and understanding of legislative history is in turn aided by the history of administrative interpretations of the statutory language, *see Sarbe v. Bustos*, 419 U.S. 65, 74, 95 S.Ct. 272, 278, 42 L.Ed.2d 231 (1974). Moreover, administrative interpretations of statutory language by the agency charged with the statute's administration are entitled to considerable deference in their own right, *United States v. Rutherford*, 442 U.S. 544, 553-54, 99 S.Ct. 2470, 2475-76, 61 L.Ed.2d 68 (1979), particularly if the interpretation in question is a long-standing one, *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n. 17, 101 S.Ct. 817, 823 n. 17, 66 L.Ed.2d 762 (1980).

In the instant case, the legislative and administrative materials pertaining to the term "income" persuade us that Congress did not intend "income" to include mandatory payroll deductions. This conclusion precludes the necessity of inquiry into whether the different set of legislative and administrative materials pertaining to the term "work expenses" indicates that Congress intended "work expenses" to include mandatory payroll deductions since, as a logical matter, mandatory payroll deductions cannot be *both* "non-income items" *and* "work expenses disregarded from income": an item must be "income" before it can be disregarded from income. *See RAM v. Blum*, *supra*, p. 609, at 946. However, because the Secretary's legislative and administrative history arguments focus almost exclusively on materials pertaining to the term "work expenses," examination of those materials follows our examination of the materials pertaining to "income."

1. *Legislative and Administrative Materials Pertaining to "Income."*

The 1939 provision requiring participating states to reference AFDC benefits to "income" was drafted by the Social Security Board, predecessor agency to DHHS. H.R.Doc. No. 110, 76th Cong., 1st Sess. (1939) (Presidential report to Congress transmitting Social Security Board's "Proposed Changes in the Social Security Act"). As noted, supra, p. 606, the legislation as enacted provided that:

> the State agency shall, in determining deed, take into consideration ... income and resources [other than AFDC payments] of any child claiming [AFDC].

Social Security Amendments Act of 1939, *supra*, p. 606, § 401(b), 53 Stat. at 1379-80 (1939) (codified at 42 U.S.C. § 602(a)(7)(A) (1976 and Supp.1982)). Despite many amendments to other clauses of Section 602(a)(7)(A), the language just quoted pertaining to "income" has never been changed. *RAM v. Blum*, *supra*, p. 609, at 944. Hence the legislative history most relevant to analysis of the maning of "income" is that surrounding the 1939 Amendments. *See Blair v. Chicago*, 201 U.S. 400, 453-54, 26 S.Ct. 427, 437-38, 50 L.Ed. 801 (1906).

The House and Senate reports relating to the 1939 Amendments are unilluminating, *RAM v. Blum*, *supra*, p. 609, at 945, but other parts of the legislative record indicate that Congressional intent was focused on requiring states to subtract from recipients' grants only the amount of "income" actually available to them. *Hearings Relative to the Social Security Amendments Act of 1939*, 76th Cong., 1st Sess. at 2254 (colloquy between Representative Duncan and Arthur Altmeyer, then Chairman of the Social Security Board); 84 Cong.Rec. 6861 (June 8, 1939) (remarks of Representative Poage). Moreover, contemporaneously with enactment of the income-referencing requirement, the Social Security Board—draftors of the requirement—issued an administrative interpretation defining "income" as funds that "actually exist" and are "available," in the sense that the funds are "actually ... on hand or ready for use when ... needed." Policy Statement of the Social Security

Board (December 20, 1940), reprinted in *Guide to Public Assistance Administration*, § 202, at pp. 1-2(1942). This interpretation of the statute by the agency charged with its administration deserves considerable deference, *United States v. Rutherford*, 442 U.S. 544, 553-54, 99 S.Ct. 2470, 2475-76, 61 L.Ed.2d 68 (1979), and buttresses the *RAM* court's conlusion that:

> [t]he legislative history ... strongly indicates that Congress, in enacting the Social Security Amendmetns Act of 1939, understood the word 'income' to mean *net* income, and thus not to include mandatory payroll deductions.

RAM v. Blum, *supra*, p. 609, at 947 (emphasis in original).

In addition to buttressing the theoretical conclusion that the 76th Congress intended "income" to mean *net* income, the Social Security Board's 1940 administrative interpretation had the practical effect of influencing states administering AFDC programs from 1939-62 to disregard mandatory payroll deductions before subtracting "income" from the standard of assistance"—i.e., the states treated "income" as meaning net income. *RAM v. Blum*, *supra*, p. 609, at 945. This state practice of treating "income" as net income has received tacit Congressional approval, since Congress has never availed itself of the opportunity to amend the language pertaining to "income," even when other sections of the AFDC statutes were being amended in 1962. *See Saxbe v. Bustos*, 419 U.S. at 74, 95 S.Ct. at 278-79 (Congressional silence implies approval). Thus the legislative and administrative history pertaining to the term "income" strongly supports the conclusion that Congress intended the term *not* to include mandatory payroll deductions.

2. *Legislative and Administrative Materials Pertaining to "Work Expenses."*

The Secretary does not refute the 1939 legislative and administrative materials pertaining to the term "income." Rather, the Secretary contends that, regardless of what the 1939 Congress intended regarding the meaning of "income," the more recent Congressional intent has been that mandatory payroll deductions constitute "work expenses."

See Dickenson v. Petit, *supra*, p. 609, at 1112-13. At best, this argument would lead to the conclusion that the different Congresses unwittingly sent contradictory signals. However, the recent legislative and administrative history of the Social Security Act does not support the conclusion that the more recent Congressional intent has been to include mandatory payroll deductions among "work expenses."

As noted, *supra*, pp. 607-608, the "work expenses" disregard was introduced by Section 106(b) of the Public Welfare Amendments Act of 1962, *supra*, p. 608, 76 Stat. at 188 (1962), amended by OBRA, *supra*, p. 606, § 2302, 95 Stat., *supra*, p. 606, 76 Stat. at 188 (1962), amended by OBRA, *supra*, p. 606, § 2302, 95 Stat. at 844-45 (1981) (codified at 42 U.S.C. § 602(a)(8)(A)(ii)-(iii) (1976 and Supp.1982)). Nothing in the legislative record of that Act even remotely suggests any Congressional intent to subtract mandatory payroll deductions from "income" pursuant to the newly-created "work expenses" disregard. This absence is not surprising for, as the *RAM* court noted:

> since mandatory payroll deductions were not within the meaning of [Section 602(a)(7)(A)] income, there was no reason for Congress to pass legislation requiring such amounts to be [disregarded as "work expenses"] from ... income.

RAM v. Blum, *supra*, p. 609, at 946.

Despite both the barren 1962 legislative record and the long-standing administrative practice of treating mandatory payroll deductions as non-income items, the Secretary urges that mandatory payroll deductions became "work expenses" sometime around or after 1962. His arguments derive from three sources: administrative practice in the states from 1962-81, the 1981 legislative history of OBRA, and present DHHS regulations.

First, the Secretary relies upon an administrative practice which grew up in many states in the years following the 1962 introduction of the "work expenses" disregard, and particularly in the years following the 1974 *Shea* decision requiring that "work expenses" be itemized. On the forms used in computing recipient grants, many states

listed mandatory payroll deductions in the "work expenses" category. *See* Internal Memorandum of the Department of Health, Education and Welfare (February 1, 1972) (discussing expenses reasonably attributable to the earning of income); *see also James v. O'Bannon*, *supra*, p. 631, at 639. The Secretary offers this practice as evidence that mandatory payroll deductions became "work expenses" in the post-1962 period. However, a likelier explanation for the practice is simple administrative convenience. For those states itemizing work expenses, either before or after *Shea*, there was no practical reason to distinguish between those items disregarded from income because they were work expenses—either way the mandatory payroll deductions were not going to be counted as "income" for purposes of decreasing benefits. And the Secretary's own exhibits reveal that, in those states in which work expenses were not itemized prior to 1974, mandatory payroll deductions—although listed in the "work expenses" category on the forms—were nonetheless computed on an *individualized basis* flatly inconsistent with the treatment then accorded to work expenses in those states. See Internal Memorandum of the Department of Health, Education and Welfare (March 22, 1973) (discussing treatment of work expenses); Internal Memorandum of the Department of Health, Education and Welfare (April 3, 1972) (discussing expenses reasonably attributable to the earning of income); *see also Shea v. Vialpando*, 416 U.S. at 255, 94 S.Ct. at 1751.[8] Hence we conclude that administrative practice in

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[8] As noted, *supra*, p. 606, the Supreme Court in *Shea* held that the 1962 amendments to the Social Security Act required itemization of work expenses. The specific state plan disapproved in *Shea* had required "individualized treatment of mandatory payroll deductions and child-care costs," but permitted standardized treatment of "all other work-related expenses." *Shea*, 416 U.S. at 255, 94 S.Ct. at 1751. Thus in our view the state plan disapproved in *Shea* provides further evidence that, in the years after 1962, states administering AFDC programs still considered mandatory payroll deductions as items excluded from "income" and therefore excluded from the "work expenses" category.

We note that a different conclusion was reached by the court in *Dickenson v. Petit*, *supra*, p. 609. The *Dickenson* court ... implicitly

the years 1962-81 does not support the Secretary's contention that mandatory payroll deductions constitute "work expenses."

Second, the Secretary relies upon the legislative history of OBRA to support his contention that mandatory payroll deductions constitute "work expenses." In particular, he calls our attention to S.Rep. No. 97-139, *supra*, p. 608, at 770-71, which indicates that the 97th Congress may have understood "income" in the AFDC statutes to mean gross income. *See Dickerson v. Petit*, *supra*, p. 609, at1114-15. However, as noted, *supra*, pp. 610-611, OBRA amended

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recognized mandatory payroll deductions . . . as work-related expenses *under pre-OBRA law.*" *Dickerson* court did not indicate the location in *Shea* of this "implicit recognition," but the language quoted above from page 255 of the *Shea* we can find which might arguably support the *Dickerson* court may have reasoned that, since the Supreme Court's discussion in *Shea* of "mandatory payroll deductions and child-care costs" is immediately followed by the reference to "all *other* work-related expenses," *Shea*, 466 U.S. at 256, 96 S.Ct. at 1751 (emphasis supplied), mandatory payroll deductions and child-care costs must both be work-related expenses.

We note that, as a grammatical matter, the word "other" is ambiguous, in that it can also be taken as referring solely to "child-care costs" and not to "mandatory payroll deductions"; i.e., we read the *Shea* court's reference to "other work-related expenses" to imply that child-care costs are work expenses, but that mandatory payroll deductions are still non-income and non-work-expense items. This reading recommends itself to us because:

> (1) mandatory payroll deductions were certainly not work expenses before 1962, when there was no "work expenses" disregard;
>
> (2) as noted, *supra*, pp. 611-612, nothing in the 1962 legislative history indicates that mandatory payroll deductions became work expenses in 1962;
>
> (3) as noted, *supra*, p. 612, nothing in the administrative practice in the years immediately following the 1962 introduction of the "work expenses" disregard indicates that mandatory payroll deductions became work expenses during those years;
>
> (4) We do not believe that the Supreme Court in *Shea* would have announced a change in the status of mandatory payroll deductions by means of a single ambiguous reference to "other work-related expenses."

For these reasons we disagree with the *Dickerson* court's conclusion that *Shea* implicitly recognized mandatory payroll deductions as work expenses.

the statutory language pertaining to the "work expenses" disregard but did *not* amend the language pertaining to the "income"-referencing requirement; hence the legislative history of OBRA is relevant to an understanding of the term "work expenses," but not to the meaning of the term "income." *See Blair v. Chicago*, 201 U.S. at 453-54, 26 S.Ct. at 427-28. The Secretary fails to point us to any passage in the legislative record of OBRA at which mandatory payroll deductions are referred to as "work expenses." Moreover, the very Senate report upon which the Secretary relies expressly characterizes "work expenses" as administratively burdensome items subject to applicant falsification, S.Rep. No. 97-139, *supra*, p. 608, at 768-69. Yet mandatory payroll deductions are paradigmatic examples of items *not* subject to applicant falsification and not at all difficult for administering states to calculate. *RAM v. Blum*, *supra*, p. 609, at 946. Hence we conclude that, if anything, the legislative history of OBRA indicates that Congress did *not* intend mandatory payroll deductions to be considered "work expenses."

Finally, the Secretary points to the present DHHS regulations implementing the "work expenses" disregard provision of the AFDC statutes, 42 U.S.C. § 602(a)(8)(A)(ii) 1976 and Supp.1982). The statutory provision calls for this standardized disregard of $75.00 to come from "earned income," which the DHHS regulations define as:

> the total amount, irrespective of personal expenses, *such as income-tax deductions*, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

45 C.F.R. § 233.20(a)(6)(iv), *as amended in* 47 Fed.Reg. 5648, 5676 (1982) (emphasis supplied). The Secretary argues persuasively that this regulation places mandatory payroll deductions in the same category as out-of-pocket "work expenses" such as transportation, lunches and special clothing. *See Dickerson v. Petit*, *supra*, p. 609, at 1111; *James v. O'Bannon*, *supra*, p. 631, at 638. However, the

regulation is flatly inconsistent with another DHHS regulation, entitled "Income and Resources," which requires that:

> [a]State plan for ... AFDC ... must ... provide that, *in determining need and the amount of the assistance payment*, ... *net income ... available for current use* ... shall be considered.

45 C.F.R. § 233.20(a)(3)(ii)(D), as amended in 47 Fed.Reg. 5648, 5675 (1982) (emphasis supplied). The regulation cited by the Secretary defines mandatory payroll deductions as "work expenses," yet the latter regulation defines mandatory payroll deductions as non-income items. As noted, *supra*, p. 610, logic precludes mandatory payroll deductions from being both non-income items and work expenses disregarded from income, since an item must be income before it can be disregarded from income. *See RAM v. Blum*, *supra*, p. 609, at 946. Hence we decline to draw any conclusions about Congressional intent from the clearly inconsistent regulations promulgated by DHHS, and, in light of this inconsistency, we believe it would be inappropriate to defer to the Secretary's present interpretation of the AFDC statutes.

In sum, our review of the legislative and administrative history of the Social Security Act of 1935, the amending Acts of 1939 and 1962, and OBRA leads us to agree with the *RAM* court that Congress intended mandatory payroll deductions to be disregarded in calculating the amount of an eligible family's AFDC grant because such deductions are not "income," and not because such deductions are "work expenses."

E. CONGRESSIONAL PURPOSE

In this case, the parties and the three district courts which have considered the issue have de-emphasized arguments derived from congressional purpose, as compared with the exhaustive treatment accorded arguments derived from legislative and administrative history. However, any court faced with a problem of statutory construction must endeavor to interpret the statute at issue in light of the purposes Congress sought to serve. *Chapman v. United States*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d

608 (1979). We conclude that the Congressional purposes underlying the AFDC statutes provide a persuasive and independent basis supporting our conclusion that the Social Security Act requires subtraction from gross income to mandatory payroll deductions in addition to subtraction of the "work expenses" disregard.

As noted, *supra*, p. 607, the AFDC program serves two Congressional purposes: to provide for the needs of families with dependent children, 42 U.S.C. § 601 (1976), and to encourage AFDC families to secure and retain employment, *Shea v. Vialpando*, 416 U.S. at 264, 94 S.Ct. at 1755. This case presents two alternatives: either mandatory payroll deductions constitute "work expenses," or they constitute non-income items which must be disregarded from gross income *in addition* to the "work expenses" disregard. In the context of Congressional purposes, the question thus becomes: which of these alternatives best serves the twin congressional purposes underlying the AFDC statutes?

Defendants' own statistics reveal that the average amount of mandatory payroll deductions for working AFDC families in California in 1980 was $83.00 per month. California State Department of Social Services Program Series Information Report 1982-44, "AFDC Social and Economic Characteristics for Families Receiving Aid during July 1980" at Table 18 (January 1982). The average amount of out-of-pocket work-related expenses for working AFDC families in California in 1980 (not including mandatory payroll deductions or child care costs)[9] was $60.00 per month. *Id.* Treating the effects of inflation, which make both 1980 figures somewhat low for 1982, as counterbalanced by the effects of applicant falsification, which make the out-of-pocket expenses figure somewhat high, these figures can be taken as roughly accurate estimates of the actual expenses of working AFDC families in California in 1982.

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[9] Child care costs are "work expenses" that are still itemized, post-OBRA, 42 U.S.C. § 602(a)(8)(A)(iii), and hence do not fall under the $75.00 category covering the other out-of-pocket "work expenses."

According to these figures, the average working AFDC family in California incurs $163.00 of expenses in obtaining income ($83.00 in mandatory payroll deductions plus $80.00 in out-of-pocket expenses). If mandatory payroll deductions were included as "income" and constituted "work expense," then the average working AFDC family in California would receive as a credit only $75.00 per month (the standardized "work expenses" disregard) to cover these $163.00 of expenses.

Under these circumstances, the average working AFDC family in California would have a very strong incentive not to work, since each family would be on average $88.00 per month worse off than if it had declined to work.[8] Such a result would clearly be inconsistent with the Congressional purpose of encouraging work, as well as fundamentally wrongheaded.

If on the other hand mandatory payroll deductions constitute non-income items and are thus subtracted from gross income in addition to the "work expenses" disregard, then the average working AFDC family in California will receive $158.00 ($83.00 in mandatory payroll deductions plus the standardized $75.00 "work expenses" disregard) to cover the $163.00 of expenses incurred in obtaining income. Under these circumstances, the average working AFDC family in California will have only a very slight incentive not to work, since each family will be on average $5.00 per month worse off than if it had declined to work.[9] This slight disincentive may be less than ideal, but it is much more consistent with the Congressional purpose of encouraging

[8] As noted, *supra*, p. 000 n. 3, the newly-amended "work incentive" disregard applies only for the first four months that an AFDC family has work income and hence cannot be counted upon to overcome the disincentive to work that would be created by interpreting "work expenses" to include mandatory payroll deductions.

[9] A likely explanation for this slight disincentive in California was offered at oral argument by counsel for the Secretary: the $75.00 "work expenses" disregard was designed to apply in all states, but since inequities inevitably result in that the cost of living is higher in certain states (such as California) than in others.

work than the alternative of creating a very strong disincentive to work.

Hence we conclude that the Congressional purposes underlying the AFDC statutes indicate that the Social Security Act requires subtraction from gross income of mandatory payroll deductions in addition to subtraction of the $75.00 per month "work expenses" disregard. This conclusion is buttressed by a long line of cases holding that the Congressional purpose of encouraging work can only be served by limiting the amount of "income" counted against a recipient to funds that are actually and currently available. *See King v. Smith*, 392 U.S. 309, 88 S.Ct. 2128, 20 L.Ed.2d 1118 (1968) (striking down a state regulation which denied benefits to the dependent children of a woman cohabiting with a man, regardless of whether the man in fact contributed to the support of the children); *Lewis v. Martin*, 397 U.S. 552, 90 S.Ct. 1282, 25 L.Ed.2d 561 (1970) (striking down similar state statute); *Van Lare v. Hurley*, 421 U.S. 338, 95 S.Ct. 1741, 44 L.Ed.2d 208 (1974) (striking down state statute which denied benefits to dependent children of woman permitting lodger to stay with family, regardless of whether lodger actually contributed to the support of the children); *see also Watson v. Comm. Dept. of Public Welfare*, 42 Pa.Commwlth. 181, 400 A.2d 669 (1979) and *Horbelt v. Berger*, 43 N.Y.2d 102, 400 N.Y.S.2d 780, 371 N.E.2d 499 (1977) (both cases holding that, under state welfare statutes, mandatory payroll deductions are not income currently and actually available for use by welfare recipients).[10] As the *Horbelt* court noted:

> When taxes are taken from a home relief recipient's wages at the source they might just as well have never

[10] The Secretary attempts to distinguish these cases by arguing that their emphasis on the actual availability of income refers not to the level of income from a particular source, but to the availability of the source itself. *See* Dickerson v. Pitt, *supra*, p. 000, at 1115-17 n. 13. We find this distinction unsupported by the language of these cases, each of which uniformly speaks in terms of the availability of income, and not of the availability of sources of income. However, we also note that we do not rely upon these cases for our conclusion that defendants' own statistics demonstrate that the Secretary's interpretation of mandatory payroll deductions as "work expenses" would radically disserve the Congressional purposes underlying the AFDC statutes.

> been earned by him at all insofar as his ability to meet his immediate need to feed, house or clothe his family is concerned. Blindness to that fact can serve but to sap a recipient's incentive to work and so tends to operate at cross-purposes to the legislative intent.

Berkshire, 400 N.Y.S.2d 783-84, 371 N.E.2d at 502-03.[11]

IV. ORDER

For the foregoing reason, good cause appearing,

IT IS HEREBY ORDERED that defendants Marion J. Woods, Kyle McKinney, Mary Ann Graves, the Department of Social Services of the State of California and the Department of Finance of the State of California, their successors in office, their agents, officers and employees and representatives, including employees of county welfare departments, are permanently enjoined from including mandatory payroll deductions such as federal, state and local income taxes, Social Security taxes (F.I.C.A.) and state disability insurance within the definition of "income" in interpreting and applying that term as used in Section 602(a)(7)(A) of Title 42 of the United States Code.

IT IS FURTHER ORDERED that third-party defendant Richard J. Schweiker, Secretary of the United States Department of Health and Human Services, is permanently enjoined from responding to defendants' compliance with this Order by terminating federal matching funds contributed to California's AFDC Program.

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[11] The anomaly inherent in treating as "income" funds never actually received is dramatically underscored by a recent California case holding that, should recipients subsequently receive any of the withheld mandatory payroll deductions (as, e.g., income tax refunds), they will be charged with "income" again at the time those funds are received. *Vierson v. Woods*, 131 Cal.App.3d 1023, 182 Cal.Rptr. 725, 82 Daily Journal D.A.R. 1360 (Calif.Ct. of Appeal June 7, 1982). Concerning the Secretary's present interpretation that mandatory payroll deductions are "income" even when withheld, with the *Vierson* ruling that the same funds are again "income" if refunded, would result in an injustice bordering on the Kafkaesque. Since we believe the *Vierson* ruling comports with the Congressional intent and purpose underlying the AFDC statutes, we disapprove the Secretary's interpretation of those statutes.

MOTIONS FOR RECONSIDERATION, STAY PENDING APPEAL AND CIVIL CONTEMPT

This cause came on for hearing on August 30, 1982, on three motions: defendants' motion for reconsideration of the Court's July 29, 1982 Opinion and Order, defendants' motion in the alternative for a stay of the July 29 Order pending appeal, and plaintiffs' motion for civil contempt for defendants' alleged noncompliance with the July 29 Order. The Court having heard oral argument, and having considered the papers submitted by the parties—including the August 31, 1982 letter of George C. Hoil to the Court regarding work expenses in states other than California—for the reasons hereinafter stated, all three motions are denied.

DEFENDANTS' MOTION FOR RECONSIDERATION

On July 29, 1982, the Court held that the term "income" in 42 U.S.C. § 602(a)(7)(A) means net income, and therefore that mandatory payroll deductions should not be considered income items for purposes of calculating AFDC grants. Accordingly, the Court permanently enjoined defendants from including mandatory payroll deductions in an AFDC recipient's "income" for purposes of subtracting income from need to determine the amount of the recipient's grant. The Court expressly based its July 29 Opinion and Order on two separate and independent bases:

1) the legislative and administrative history of the AFDC statutes (explicated at pp. 9-19 of the Opinion), which indicate that the term "income" has always been used in the AFDC statutes to mean net income, whereas the term "earned income" has been used to denote gross income; and

2) the Congressional purposes and underlying the AFDC statutes (explicated at pp. 19-21 of the Opinion), which indicate that the term "income" should be interpreted so as best both to provide for the actual needs of AFDC families and to encourage AFDC families to work.

Defendants challenge both bases of the Court's Opinion and Order. The Court is not persuaded that either challenge has merit.

Defendants' challenge to the legislative and administrative history basis consists entirely of arguments already advanced in their papers and at oral argument prior to the July 29 Opinion and Order. The major thrust of this challenge is that the meaning of the term "earned income"—which appears in 42 U.S.C. § 602(a)(8) and which clearly means 'gross income'—should control the meaning of the term "income," which appears in 42 U.S.C. § 602(a)(7). The Court rejected this argument *sub silentio* the first time around because of the obvious flaws in the argument:

1) "earned income" is not the same term as "income";

2) when "earned income" was first enacted into the AFDC statutes in 1962, Congress did not conform the already-existing term "income," even though the term "income" was located in the very next subsection—thus suggesting that Congress understood the term "income" to have a different meaning from "earned income."

Moreover, the defendants' argument for reconsideration does not touch upon the central thrust of the Court's Opinion: the term "income" meant net income when it was enacted, it has never been amended, and nothing in the forty-odd years of subsequent legislative history surrounding amendments to other words and sections of the AFDC statutes has ever indicated that Congress intended to change

the meaning of "income." Generalized quotations from the 1981 legislative record to the effect that Congress was hoping to cut welfare spending do not amount to indications that the meaning of "income" in 42 U.S.C. § 602(a)(7) has been changed by the passage of the Omnibus Budget Reconciliation Act.

Defendants' challenge to the congressional purpose basis underlying the July 29 Opinion and Order is also unpersuasive, but it warrants a longer look because it raises statistical matters requiring clarification. In the July 29 Opinion, the Court stated that the average mandatory payroll deductions of working AFDC recipients in California in 1982 must be *roughly* $83.00 per month, and that the average work expenses (excluding child care) must be *roughly* $80.00 per month. We based these estimates upon certain Tables compiled by defendants, as well as upon certain developments post-dating compilation of the Tables. We advanced the numbers to demonstrate that the Congressional purposes underlying the AFDC statutes would be better served by interpreting "income" to mean net income rather than gross income: specifically, using the above statistical estimates, the Court noted that construing "income" to mean net income results in an effective credit for AFDC recipients of $158.00 ($83.00 in excluded mandatory payroll deductions plus $75.00 in standardized work expenses disregards) to cover $163.00 of expenses. Dramatically, defendants assert that the statistics advanced by the Court are wrong, and therefore that the congressional purpose basis underlying the July 29 Order should be reconsidered.

Ordinarily, nothing is better calculated to galvanize a court to reconsideration than a dramatic statement that the court has used inaccurate numbers. In this case, of course, since the July 29 Opinion and Order expressly rested on two separate and independent bases, the alleged inaccuracy of the numbers, even if true, would not warrant reconsideration unless defendants had also persuaded the Court that the legislative history did not support the issuance of the injunction. But a more fundamental reason for denying the motion for reconsideration is that the defendants' argument concerning the statistics is itself unpersuasive. The Court

notes three fundamental flaws with defendants' argument that the cited statistics are wrong.

First, the Court expressly qualified the statistics cited in the July 29 Opinion as representing only *"roughly accurate estimates"* of the average mandatory payroll deductions and average work expenses of AFDC recipients in California. This qualification was necessary because the Tables from which the statistics were culled date from 1980, and apparently no Tables of more recent vintage are available. The Court noted that the effects of spiraling inflation would like render 1980 figures somewhat low for 1982, but that the effects of applicant falsification of work expenses would likely render the *reported* 1980 work expenses figures somewhat higher than the *actual* 1982 figures. Moreover, plaintiffs have subsequently pointed out that the effects of the decision in *Green v. Obledo*, 29 Cal.3d 126, 172 Cal.Rptr. 206, 624 P.2d 256 (1981) would likely render the 1980 work expenses figures somewhat low for 1982. Since all these post-1980 effects remain unquantified, and since theCourt expressly labeled the cited statistics as "estimates," defendants' dramatic assertion that the cited statistics are "wrong" at best amounts to hyperbole.

Second, defendants offer alternative statistical estimates culled from the same Tables which are themselves "wrong." Defendants produce lower figures for the average mandatory payroll deductions and average work expenses by *lumping full-time and part-time workers together*. Since the standardized statutory work expenses disregard at issue is applicable to *full-time workers only*, defendants' inclusion of part-time workers—whose mandatory payroll deductions and work expenses are obviously lower than those of full-time workers—produces an indefensible downward distortion in the statistics which defendants assert are the "correct" ones.

Third, and most damaging to defendants' argument, even if the Court were to base its estimates upon defendants' distorted statistics, the numbers defendants would have to use still support rather than undercut the Court's congressional purpose analysis. Defendants estimate the average mandatory payroll deductions of working AFDC recipients

in California in 1982 at $70.00 per month, and the average work expenses at $42.00 per month. Using these statistical estimates, construing "income" to mean net income results in an effective credit for AFDC recipients of $145.00 ($70.00 in mandatory payroll deductions plus $75.00 in mandatory payroll deductions plus $75.00 in standardized work expense disregards) to cover $112.00 of expenses, whereas construing "income" to mean gross income would result in an effective credit for AFDC recipients of only $75.00 to cover $112.00 of expenses. Hence even using defendants' numbers, construing "income" to mean net income creates an incentive for AFDC families to work, whereas construing "income" to mean gross income would strongly discourage those families from working. Thus defendants have failed persuasively to challenge the congressional purpose basis underlying the July 29 Order.

Accordingly, for the foregoing reason,

IT IS HEREBY ORDERED that defendants' motion for reconsideration of the July 29 Opinion ad Order is denied.[1]

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[1] The Court notes that between the date of oral argument on the motion for reconsideration and the date of the present order, defendants have filed Notice of Appeal. The general rule is that a notice of appeal transfers jurisdiction over any matters involved in the appeal from the district court to the appellate court. *Petrol Stops Northwest v. Continental Oil Co.*, 647 F.2d 1005, 1010 (9th Cir.1981). The rationale for this rule is to avoid the confusion and inefficient use of scarce judicial resources that might flow from putting the same issues before two courts at the same time. *In the Matter of Thorp*, 655 F.2d 997, 998 (1981); 9 Moore, Federal Practice ¶203.11 n. 1.

However, an exception to the general rule exists for cases where, as here, continued district court jurisdiction will not be confusing or inefficient because the district court order is "in aid of the appeal, or to correct clerical mistakes." *In the Matter of Thorp*, 655 F.2d at 998. In light of the importance of this case and in light of the uncertainty about statistical matters engendered by our July 29 Opinion and Order, we note continued jurisdiction over the mandatory payroll deductions issues, under the exception described in *Thorp*, and for purposes of this Order only.

THE ALTERNATIVE MOTION FOR A STAY PENDING APPEAL

Defendants have moved the Court in the alternative for a stay of our July 29 Order pending appeal. The effect of this stay would be to interrupt the payment of welfare benefits as ordered by the Court. Four factors are relevant to deciding whether a stay pending appeal should issue:

1) the likelihood that defendants will ultimately prevail on the merits of their appeal;
2) the extent to which defendant would be irreparably harmed by denial of the stay;
3) the potential harm to plaintiffs if the stay is issued;
4) the public interest.

Florida Businessmen For Free Enterprise v. City of Hollywood, 648 F.2d 966, 967 (5th Cir.1981); *Bauer v. McLaren*, 332 F.Supp. 723 (D.Iowa 1971); *see also Schwartz v. Covington*, 341 F.2d 537, 538 (9th Cir.1965).

With respect to the first factor listed above, for the reasons stated both in the July 29 Opinion and in the text above denying the motion for reconsideration, the Court firmly believes the reasoning underlying its July 29 Order will withstand appellate scrutiny. Nonetheless, since no appellate court has yet decided the issue, and since the district courts which have decided the issue are split, the Court acknowledges that there is at least a fair prospect that defendants may prevail on the merits of their appeal. Hence the Court finds that the first factor weighs evenly tipping neither for nor against defendants.

With respect to the last three factors listed above, however, the United States Supreme Court has indicated unequivocally that in welfare cases the harm to plaintiffs and the public interest in uninterrupted welfare benefits "clearly outweighs" the harm to defendants:

> ... the interest of the eligible recipient in uninterrupted receipt of public assistance, coupled with the State's interest that his payments not be erroneously terminated, clearly outweighs the State's competing concern to prevent any increase in its fiscal and administrative burden.

Goldberg v. Kelly, 397 U.S. 254, 266, 90 S.Ct. 1011, 1019, 25 L.Ed.2d 287 (1970). Accordingly, good cause appearing,

IT IS HEREBY ORDERED that defendants' motion for a stay pending appeal is denied.

PLAINTIFFS' MOTION FOR CIVIL CONTEMPT FOR DEFENDANTS' ALLEGED NONCOMPLIANCE WITH THE COURT'S JULY 29 ORDER

The Court issued its Order on July 29, 1982 permanently enjoining defendants from including mandatory payroll deductions within the definition of "income" for purposes of calculating AFDC eligibility and grants. Defendants estimate the cost of implementing the Court's injunction at roughly $2.5 million per month. Affidavit of California Department of Finance Director Mary Ann Graves, August 19, 1982, Exhibit A. The Court takes judicial notice of the fact that $2.5 million is a lot of money and, as such, cannot be expected to materialize overnight.

Plaintiffs contend that defendants have not complied promptly with the Court's Order, yet the facts do not support plaintiffs' contention. On August 6, 1982, defendant Mary Ann Graves requested waiver from the California Legislature of the 30-day "waiting period" purportedly required by the State Budget Act for all expenditures in excess of $500,000. On August 9, 1982, defendant Marion J. Woods notified all county welfare directors of the Court's July 29 Order, and alerted the directors to be ready for an orderly effectuation of the Court's order in a time-frame dependent upon the California Legislature's decision regarding waiver of the 30-day period. On August 20, 1982, the Legislature approved defendant Graves' request. On August 23, 1982, defendant Department of Finance approved the issuance of a letter by defendant Department of Social Services instructing all county welfare directors to implement the Court's July 29 Order beginning with the September welfare grants. Declaration of California Deputy Attorney General Charlton G. Holland, August 24, 1982, Exhibits A and B. Shortly thereafter, that letter went out.

Plaintiffs contend that defendants' reliance upon the State Budget Act is totally unsupported by case law, and that defendants are invoking that Act merely to conceal

their willful decision to delay compliance with the Court's July 29 Order. Plaintiffs cite authority for the proposition that state officials cannot use state law as a shield to avoid compliance with federal court orders, *Hutto v. Finney*, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978); *Gary W. v. State of Louisiana*, 622 F.2d 904 (5th Cir.1980), *cert. den.*, 450 U.S. 994, 101 S.Ct. 1695, 68 L.Ed.2d 193 (1981); *LaRaza Unida v. Volpe*, 434 F.Supp. 36 (N.D.Cal.1982), but plaintiffs cite no cases holding that state officials must *immediately* comply with federal court orders irrespective *of any state law or pactical constraints*. In the court's view, defendants have complied with the Court's July 29 Order within a tolerably prompt time period, since a twenty-five day delay in gathering $2.5 million and preparing for its disbursement would not have been unreasonable even if defendants had not had the State Budget Act to worry about. Thus the Court declines to decide the unnecessary question *of whether defendants'* reliance upon the State Budget Act was justifiable or not, particularly in light of the sensitive issues of federal-state relations which such a determination would involve. *See Welsch v. Likins*, 550 F.2d 1122, 1132 (8th Cir.1977).

Accordingly, good cause appearing,

IT IS HEREBY ORDERED that plaintiffs' motion for civil contempt for defendants' noncompliance with the Court's July 29 Order is denied.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 82-6552
No. 82-6566
No. 82-6567
No. 82-6589
DC CV 81-4457

SANDRA TURNER, DEBRA SCHUCH, JERRELEAN BAKER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS/APPELLEES,

v.

JERALD PRIEN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA, ET AL., DEFENDANTS/APPELLANTS,

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA, DEFENDANT & THIRD-PARTY PLAINTIFF/APLT.

v.

MARGARET HECKLER, ETC., THIRD-PARTY DEFENDANT/APPELLANT.

APPEAL from the United States District Court for the Northern District of California

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the Northern District of California and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered JUNE 10, 1983

APPENDIX D

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Nos. 82-4552, 82-4566, 82-4567, 82-4599

DC No. CV 81-4457-TEH
Filed: Sep. 07, 1983

SANDRA TURNER, DEBRA SCRUGGS, JERRYLEAN BAKER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS-APPELLEES,

v.

JEROLD PROD, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; ET AL., DEFENDANTS-APPELLANTS,

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA, DEFENDANT AND THIRD-PARTY PLAINTIFF/APPELLANT,

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, THIRD-PARTY DEFENDANT/APPELLANT.

Appeal from the United States District Court
for the Northern District of California
Thelton E. Henderson, District Judge, Presiding

ORDER

Before: ELY, SKOPIL and FERGUSON, Circuit Judges

The panel as constituted in the above case has voted to deny the petition for rehearing and to deny the suggestion for rehearing en banc.

The opinion filed June 10, 1983 has been amended by order filed August 11, 1983. The full court has been advised of the modification of the opinion and of the suggestion for en banc rehearing, and no judge has objected to the modification or requested a vote on the suggestion for rehearing en banc. Fed. R. App. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

RESPONDENT'S

BRIEF

No. 83-1097

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

vs.

SANDRA TURNER, et. al,
Respondents.

BRIEF FOR STATE RESPONDENTS IN SUPPORT OF PETITION FOR CERTIORARI

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QUESTION PRESENTED

Whether, in computing the grant for an AFDC recipient who has income from earnings (i.e., "earned income"), the State must allow a deduction for mandatory payroll deductions for taxes, despite the fact that section 402(a)(8) of the Social Security Act (the section which delineates the allowable deductions from "earned income") does not provide for any such deduction.

PARTIES TO THE PROCEEDING

In addition to parties named in the caption to the Petition for Certiorari, the following were parties in the Court of Appeals:

Appellees

Debra Scruggs

Jerrilean Baker

California Coalition of Welfare Rights Organizations

(All appellees had sued in the District Court on behalf of themselves and all others similarly situated, to wit, as a class action on behalf of all AFDC recipients who had income from earnings.)

Appellants

Marion J. Woods, individually and as Director of the Department of Social Services of the State of California. At the time the Court of Appeals issued its decision, the Director was Jerald Pace. At the present time, the Director of the Department of Social Services is Linda S. McMahon.

Kyle McKinsey, individually and as Deputy Director of the Department of Social Services of the State of California. Mr. McKinsey is still a Deputy Director.

THE DEPARTMENT OF SOCIAL SERVICES of the State of California.

MARY ANN GRAVES, individually and as Director of the Department of Finance of the State of California. At the time the Court of Appeals issued its decision, the Director was MICHAEL FRANCHETTI. At the present time, JAMES R. HUFF is the Director of the Department of Finance.

THE DEPARTMENT OF FINANCE of the State of California.

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Statutes and Rules

Other Authorities

No. 83-1097

In the Supreme Court

OF THE

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OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
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vs.

SANDRA TURNER, et. al,
Respondents.

BRIEF FOR STATE RESPONDENTS IN SUPPORT OF PETITION FOR CERTIORARI

The Attorney General of the State of California, on behalf of the Department of Social Services, the Department of Finance and their Directors, urges this Court to grant the Petition for Certiorari in this case.

INTRODUCTORY STATEMENT

This case involves the nationwide categorical welfare program known as Aid to Families With Dependent Children ("AFDC") enacted by Congress in Section IV of the Social Security Act of 1935. 42 USC § 601 *et seq.* Essentially, AFDC is a cooperative federal-State venture. States that have an "approved plan" and operate their AFDC programs in the manner mandated by Congress are entitled to federal financial participation in the costs of the program. 42 USC § 603. California has an "approved plan" and complies with federal requirements.

In the Omnibus Budget Reconciliation Act of 1981 ("OBRA") (P.L. 97-35), Congress mandated radical changes in the manner welfare grants were to be computed for those AFDC recipients that had income from earnings (i.e., "earned income"). The California Department of Social Services (the "single State agency" which supervises the AFDC program in California) adopted regulations implementing those changes in precisely the manner required by the U.S. Department of Health and Human Services ("HHS"), the agency which administers the AFDC program at the federal level.

The plaintiffs initiated this class action against the State respondents, alleging that the State regulations were contrary to the OBRA amendments. Because the State regulations were precisely as mandated by HHS, the State brought HHS into the action by way of a third-party complaint, pursuant to Federal Rules of Civil Procedure, Rule 14(a).

In the District Court and the Court of Appeals, HHS agreed that the State regulations were in full accord with the federal regulations implementing the OBRA amendments. Accordingly, it became readily apparent that the real fight was between the plaintiffs and HHS, and HHS properly assumed the laboring oar in responding to plaintiffs' arguments.

That does not mean, however, that the State respondents are mindless robots with no position on the merits. To the contrary, the State respondents believe that the federal agency is correct in its implementation of the OBRA amendments (which HHS obviously drafted for Congress) and strongly urge this Court to grant the Petition for Certiorari.

REASONS FOR GRANTING THE PETITION

I

THERE IS A CONFLICT BETWEEN THE CIRCUITS

A. The Conflict

While the State's petition for rehearing was pending before the Ninth Circuit in this case, the Court of Appeals for the Third Circuit reached just the opposite result in *James v. O'Bannon* (1983) 715 F.2d 794.

On November 17, 1983, the Court of Appeals for the Fourth Circuit filed its opinion in *Bell v. Massinga* (No. 83-1227), in which it followed *James v. O'Bannon* and rejected the decision in this case.

B. The Conflict Is Real, Direct and Involves An Important Question of Federal Law That Should Be Resolved By This Court

There can be no question but that the conflict between the circuits is real and direct. The *James* and *Bell* cases discuss this case and specifically reject its decision as erroneous.

There can be no question but that the conflict needs to be resolved by this Court. The conflict involves a question of *federal*, not State, law. It involves a federal program that operates in all fifty States and several territories. There is no legislation pending to resolve the conflict. Unless this Court acts to resolve the problem, the question will have to be litigated in all the other circuits, resulting in a crazy-quilt pattern of AFDC administration.

Likewise, there can be no question but that the question is an important one. We are not dealing with a minor, trivial matter of welfare administration for which con-

flicting rules can be tolerated. To the contrary, the issue presented in this case concerns what is perhaps the single most significant OBRA amendment to the AFDC program, namely, the manner in which welfare grants are to be computed for welfare recipients that have income from earnings. See, for example, the Senate Budget Committee Report which indicates that the changes in the earned income disregards are projected as making by far and away the largest reductions in federal expenditures. U.S. Code Cong. & Adm. News, No. 7A, September 1981, pages 713-4.

II
THE DECISION OF THE COURT OF APPEALS IS WRONG

It is not necessary to dwell at length on why the decision of the Court of Appeals is wrong. The decision is discussed, and the errors disclosed, by the decision of the Third Circuit in *James v. O'Bannon, supra*. In addition, the Solicitor General's Petition for Certiorari presents the correct analysis. Nevertheless, we wish to briefly state what we believe to be the significant points virtually ignored by the Ninth Circuit.

A. The Decision Is Contrary To the Express Language of the Statute

This case does not present an esoteric or obtuse question of Constitutional law which involves the consideration of difficult social and moral dilemmas. To the contrary, this case presents a straightforward interpretation of the 1981 amendments to the AFDC statutes which control how the States must compute the welfare grants for recipients that have income from earnings.

The point we are making is simple—when construing a statute enacted in 1981, we should look at the words used in the 1981 statute and how they were understood in 1981. When we do so, the intent of Congress becomes quite clear.

Prior to the 1981 OBRA amendments, the statutory basis for deducting taxes and other expenses relating to the earning of income was section 402(a)(7) of the Act, which provided that ". . . the State agency shall, in determining need, take into consideration any other income [of the claimant] as well as any expenses reasonably attributable to the earning of any such income." Section 402(a)(8) then allowed $30 plus ⅓ "disregard" of the "earned income" of the claimant as an incentive (or "bonus") for working.

The 1981 OBRA amendments drastically changed that approach. First, the language allowing the deduction for the "expenses reasonably attributable to the earning of any such income" was removed from section 402(a)(7). Next, all the allowable deductions from "earned income", and the order of their allowance, were set forth in section 402(a)(8).

Therefore, the single question posed by this case is whether Congress in 1981, when it used the words "earned income" in section 402(a)(8), was referring to an employee's total wages or the employee's wages less those payroll deductions for taxes. It cannot seriously be argued that in 1981 the phrase "earned income" was understood by anyone to mean anything other than an employee's total wages. The point would seem indisputable—

—for over a decade prior to the enactment of the 1981 OBRA amendments, the HHS regulations defined "earned income" as including the employee's total wages without any deduction for taxes. 45 CFR 233.20(a)(6)(iv).

—the courts consistently upheld the interpretation that "earned income", in the case of wages, meant the employee's total salary. *Arizona St. Dept. of Pub. W. v. Department of Health, E & W* (9th Cir. 1971) 449 F.2d 456, 469-71; *Connecticut St. Dept. of Pub. W. v. Department of H, E & W.* (2nd Cir. 1971) 448 F.2d 209, 214-5.

—in 1974, this Court recognized the practice of treating the total wages as "income" and deducting payroll deductions as "work related expenses". *Shea v. Vialpando* (1974) 416 U.S. 251, 254-5.

—in 1972, when it enacted the Supplemental Security Income ("SSI") program to provide cash assistance to needy aged, blind and disabled persons, Congress defined "income" from salaries to be "wages", not "take-home pay." 42 USC § 1382a(a)(1)(A).

Thus, by the time Congress enacted the OBRA amendments in 1981, the administrators, the courts and the Congress all deemed the phrase "earned income" to mean the total salary or wages of the employee. The Ninth Circuit's conclusion that in 1981 Congress had some other notion in mind simply defies common sense.

In fact, the Ninth Circuit's conclusion that "earned income" means wages after payroll deductions for taxes was not even the argument advanced by the plaintiffs. The plaintiffs conceded that "earned income" under 402(a)(8)

means wages without any deduction for mandatory payroll deductions. They argued, however, that in making the grant computation, the State must first subtract payroll deductions from wages under 402(a)(7) to arrive at "income" and then, as a second step, subtract the 402(a)(8) deductions.

Thus, for a person who worked full time and earned $600 and who had $50 of mandatory payroll deductions, plaintiffs argued that the person's total "income" was $550, but that his "earned income" was $600 for purposes of computing the deductions under section 402(a)(8). That approach does as much violence to the words of the statute as does the approach taken by the Ninth Circuit.

Section 402(a)(8)(A) provides that

> "in making the determination under paragraph 7, the State agency—(ii) shall disregard from the earned income . . . the *first $30* of the total of such earned income . . . ."

Yet, under plaintiffs' approach, that is a literal impossibility because the *first $30* was already disregarded under the computation to reduce wages to "income." Stated another way, if mandatory payroll deductions must *first* be deducted under section 402(a)(7), then it was literal nonsense for Congress to say that the "first $75" is to be disregarded under section 402(a)(8).

The only way to make any sense out of the statute is to read it exactly as the federal agency has said it was intended to read, to wit, in computing the deductions from wages, the State should make only the deductions set forth in 402(a)(8).

B. The Decision Defeats Congressional Intent

It cannot be gainsaid that the overriding purpose of the OBRA provisions in question is to *reduce* the amount of benefits payable to AFDC recipients who have jobs. After all, as its name implies, OBRA is an omnibus budget reconciliation act, designed to reduce expenditures in all departments of government so as to bring total expenditures in line with previously established goals. PL 97-35, sec. 2; 95 Stat. 357. As stated in the committee reports, the expected revenue effect of the amendments in question was to *reduce* expenditures by $206,000,000. U.S. Code Cong. Adm. News No. 7A, September 1981, page 447.

It is undisputed that the $206 million figure was arrived at by applying the statutory amendments in precisely the manner in which they were applied by the State and federal agencies in this case.

Under the Court of Appeals' decision, a working AFDC recipient gets a deduction for payroll deductions for taxes *plus* $75 *plus* child care expenses up to $160 for each child. For most recipients in most States, this is more than they were allowed to deduct as "work related expenses" under section 402(a)(7) before the OBRA amendments. Stated another way, as construed by the Ninth Circuit, the OBRA amendments mandate an *increase* in AFDC grants to virtually all AFDC recipients who have income from earnings.

This Court should not tolerate a statutory interpretation which defeats, rather than promotes, congressional intent.

C. The Decision Produces Illogical and Irrational Distinctions

The decision of the Court of Appeals creates distinctions that are illogical and irrational, both legally and factually.

For example, the Court of Appeals concluded that amounts withheld from the paycheck for taxes are not "income" because they are not "available" to the employee. Yet the Court of Appeals concluded that other mandatory payroll deductions, such as those for mandatory retirement plan contributions or mandatory union dues, are not to be deducted. But what legal or factual basis is there for concluding that amounts withheld to pay a potential income tax liability are not "available" whereas amounts withheld to pay an actual union dues liability are "available?"

The decision creates illogical distinctions as to taxes themselves. Take, for example, the situation of two working AFDC mothers who both earn $300 per month doing dressmaking work. One works for a local store as an employee; the other works as an independent contractor. The first would have taxes withheld; the other would pay her taxes on quarterly tax returns. The taxes, however, would be the same. Under the Court of Appeals' decision, the "income" of the first would be reduced by the amount of the withheld taxes. The other would have no such deduction from "income." What possible logic supports the conclusion that Congress intended more AFDC benefits to be paid to the first?

The Court of Appeals' decision violates the cardinal rule of statutory construction that statutes should be construed to reach logical results.

CONCLUSION

The decision of the Court of Appeals in this case is in direct conflict with the decision of the Court of Appeals for the Fourth and Third Circuits. The conflict involves a major federal statute on an important nationwide issue.

The decision of the Court of Appeals does violence to the words of the statute, defeats congressional intent and produces illogical distinctions.

The Petition for Writ of Certiorari should be granted.

Dated: January 19, 1984

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 83-1097

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

vs.

SANDRA TURNER, et al.,
Respondents.

BRIEF FOR AFDC RESPONDENTS IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) § 602(a)(7), requires that in determining eligibility and benefits under the Aid to Families with Dependent Children (AFDC) Program, amounts withheld for mandatory payroll taxes from the income of AFDC beneficiaries must be excluded from consideration as income not actually available to meet the family's current support needs.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Debra Scruggs, Jerrylean Baker and the California Coalition of Welfare Rights Organizations, on behalf of themselves and all others similarly situated, were appellees in the Court of Appeals. State appellants in the Court of Appeals were Marion J. Woods and his successor, Jerold Prod, Directors of the California Department of Social Services; Kyle McKinsey, Deputy Director of the California Department of Social Services; the California Department of Social Services; Mary Ann Graves and her successor, Michael Franchetti, Directors of the California Department of Finance; and the California Department of Finance. At the present time, Linda G. McMahon is the Director of the California Department of Social Services and Jesse R. Huff is the Director of the California Department of Finance. The original federal appellant in the Court of Appeals was Richard Schweiker, then Secretary of Health and Human Services.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

TABLE OF AUTHORITIES

Statutes and Regulations

Other Authorities

No. 83-1097

In the Supreme Court

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BRIEF FOR AFDC RESPONDENTS IN RESPONSE TO PETITION FOR A WRIT OF CERTIORARI

Sandra Turner and the class of AFDC recipients represented by her and others (hereinafter AFDC respondents) submit this brief in response both to the Petition for a Writ of Certiorari filed by the federal government and the supporting brief already filed by respondents for the State of California.

INTRODUCTION

This case raises questions about the method of computing eligibility and benefits for households with working recipients under the Aid to Families with Dependent Children (AFDC) Program, Subchapter IV, Part A, of the Social Security Act of 1935, 42 U.S.C. (& Supp. V) §§ 601 *et seq.* At the initiation of the litigation, there were approximately 45,000 AFDC families with working recipients in California. The specific legal issue concerns the proper construction of Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) § 602(a)(7), following enactment of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357, 843-845 (1981).

I

THE PETITION FOR CERTIORARI BOTH EMPHASIZES AND MISINTERPRETS THE WRONG PROVISION OF THE SOCIAL SECURITY ACT

In support of a writ of certiorari, the federal petitioner and the state respondents eschew a careful analysis of Section 402(a)(7) of the Social Security Act and focus instead on Section 402(a)(8), 42 U.S.C. (Supp. V) § 602(a)(8), a related but separate provision. This effort to redefine the statutory issue is the same approach pursued unsuccessfully in the courts below.

The federal and state argument is that in determining AFDC eligibility and benefits a standard work expense disregard of $75 for full-time workers (and a lesser amount for part-time workers) is now the sole legislative basis for taking into account the impact on a recipient household's disposable income of discretionary work-related expenses, such as costs of travel, meals or clothing, *and* withholdings

for mandatory payroll taxes. This provision was enacted as an amendment to Section 402(a)(8) as part of OBRA. 42 U.S.C. (Supp. V) § 602(a)(8)(A)(ii). The flaw in the state and federal governments' argument is that it misinterprets a core provision of Section 402(a)(7), now codified at 42 U.S.C. (Supp. V) § 602(a)(7)(A), which was not amended by OBRA and has been the basis for the legislative policy that requires the exclusion of mandatory payroll taxes since 1939. While there have been amendments affecting other parts of Section 402(a)(7), the language of the provision at issue has remained virtually unchanged for more than forty years.

This language has consistently been interpreted to require that only income and resources actually available to meet the current support needs of AFDC families are to be considered in determining AFDC eligibility and benefits. *See Lewis v. Martin*, 397 U.S. 552, 555 (1970); *King v. Smith*, 392 U.S. 309, 319 n.16 (1968); 45 C.F.R. § 233.20(a)(3)(ii)(D) (1982). Nonetheless, the federal and state governments would create an exception to the "actually available" standard specified in Section 402(a)(7) when considering the non-availability of mandatorily withheld payroll taxes, even though Congress has never so acted to limit its scope, and despite, at least until recently, consistent administrative interpretations to the contrary. *See Turner v. Prod*, 707 F.2d 1109, 1114-1121 (9th Cir. 1983), Appendix to Petition for Writ of Certiorari, 9a-22a (the opinion reprinted in the Appendix is not the opinion as amended August 11, 1983). Without explicitly so stating, the federal and state position appears to be that at some point Congress repealed by implication the longstanding policy of considering only

actually available income insofar as it affects the treatment of mandatorily withheld payroll taxes. Not surprisingly, the federal and state governments do not clarify when this event allegedly occurred.

In addition to not properly acknowledging the applicability of Section 402(a)(7) to the case at-hand, the argument advanced by the federal and state governments renders meaningless Congress' stated purposes in 1981 for imposing a $75 standard work expense disregard as part of Section 402(a)(8). As expressed in the Senate Report, Congress wanted to counter great variation among the states concerning consideration and treatment of work expenses, reduce administrative complexity and errors, and limit abuse in the claiming of work expenses. Senate Report (Budget Committee) No. 97-139, 2 *U.S. Code Cong. & Adm. News* 707-708 (1981). The record in this case, however, indicates that prior to OBRA virtually all states individually excluded mandatory payroll tax withholdings from consideration as available income when determining AFDC grants. *See Turner v. Woods*, 509 F.Supp. 608, 612 (N.D. Cal. 1982), Appendix t- Petition for Writ of Certiorari, 41a. While there were significant variations in state practices regarding discretionary work expenses, the treatment of mandatory payroll taxes was uniform. Furthermore, there is little complexity and few opportunities for error in welfare administration when taking into account mandatory payroll taxes since such information is standardized and is based on payroll stubs, which working recipients are required to submit monthly. E.g., California Department of Social Services Manual of Eligibility and Assistance Standards, § 40-181.2. The submission of payroll stubs also

makes it unlikely that recipients are able to falsify claims. In short, Congress' stated purposes for enacting a standard work expense disregard in 1981 do not apply to mandatory payroll taxes. It is therefore not surprising that the legislative record concerning the standard work expense disregard is devoid of any official statements about the inclusion of mandatory payroll taxes.

The state and federal approach also makes little practical sense when one considers the typical AFDC family situation. In early 1982, at the time of commencement of this case, a California mother with one child, who worked at the minimum wage ($3.35/hour), 40 hours a week, 4.3 weeks per month, would have had $97.92 withheld each month for federal and state income taxes, social security taxes and State Disability Insurance. A mother with two children who worked the same amount of time at the same rate would have had $73.72 withheld. California statistical reports show that the California statewide average amount claimed for mandatory payroll taxes by AFDC families with either a full-time or part-time working parent was $93 during July 1980. *See* California Department of Social Services, *AFDC Social and Economic Characteristics for Families Receiving Aid During July 1980*, Program Series Information Report 1982-01, Table 18 (January 1982). A limit of $75 for full-time workers to cover both mandatory payroll taxes and discretionary work expenses would operate in most situations to deny employed recipients an allowance for anything but payroll tax withholding and would not even cover all tax withholdings for most working recipients. Not only does such a result effectively nullify Congress' stated intent to provide a standard, error-free, and

abuse-free method to account for discretionary work expenses, it creates an enormous disincentive to work that directly conflicts with a fundamental purpose of the AFDC program, which is to encourage employment. 42 U.S.C. § 601.

Both before and after OBRA, Section 402(a)(8) of the Social Security Act authorized a number of disregards from income to be taken into account by welfare officials when determining AFDC eligibility and benefits. These disregards are considered in addition to those directly excluded under the core terms of Section 402(a)(7). It is Section 402(a)(7) that controls this case, not the $75 work expense disregard contained in Section 402(a)(8) as erroneously argued by the federal petitioner and state respondents.

II

THE COURT OF APPEALS FOR THE NINTH CIRCUIT CORRECTLY INTERPRETED THE SOCIAL SECURITY ACT AS AMENDED

After careful consideration of the legislative and administrative histories of Sections 402(a)(7) and 402(a)(8) and their relationship to one another, both the Court of Appeals and the District Court below concluded that neither OBRA nor any other action of Congress had altered the initial basis in Section 402(a)(7) for excluding mandatorily withheld payroll taxes from consideration as available income to meet current recipient household needs. Although the Ninth Circuit decision was a case of first impression at the appellate level, the Court was fully aware of the differing district court opinions on the disputed issue including the decisions in *Bell v. Hettleman*, 536 F.Supp. 386 (D. Md. 1983) and *James v. O'Bannon*, 557 F.Supp. 631 (E.D. Pa. 1982), which had reached the opposite conclusion and which were upheld in *Bell v. Mazzinga*, 721 F.2d 131 (4th Cir. 1983), and *James v. O'Bannon*, 715 F.2d 794 (3rd Cir. 1983).

Additional district court decisions are *Clark v. Helms*, ___ F.Supp. ___, Civ. No. 83-0-D (D.N.H. 1983) (permanent injunction for AFDC plaintiffs); *Dickerson v. Petit (Dickerson II)*, 569 F.Supp. 636 (D. Me. 1983), appeal pending, No. 83-1676 (1st Cir.) (summary judgment for defendants); *RAM v. Blum (RAM II)*, 564 F.Supp. 634 (S.D.N.Y. 1983) (summary judgment and permanent injunction for AFDC plaintiffs); *Williamson v. Gibbs*, 562 F.Supp. 697 (W.D. Wash 1983), appeal pending, No. 83-3725 (9th Cir.) (summary judgment and permanent injunction for AFDC plaintiffs); *Nishimoto v. Sues*, 561 F.Supp. 692 (D. Hawaii 1983), appeal pending, No. 83-2214 (9th Cir.) (summary judgment and permanent injunction for AFDC plaintiffs); *Dickerson v. Petit (Dickerson I)*, 536 F.Supp. 1100 (D. Me. 1982) (denial of preliminary injunction), *aff'd on other grounds* 692 F.2d 177 (1st Cir. 1982); and *RAM v. Blum (RAM I)*, 533 F.Supp. 933 (S.D.N.Y. 1982) (preliminary injunction for AFDC plaintiffs).

The applicability to mandatory payroll tax withholdings of Section 402(a)(7) now challenged by the federal petitioner has not previously been addressed by this Court since the issue did not arise as a practical problem in the administration of the AFDC program prior to OBRA. The federal petitioner and state respondents erroneously cite *Shea v. Vialpando*, 416 U.S. 251, 254-255 (1974) as bearing on the issue. As both the Court of Appeal and District

Court below concluded, the *Shea* decision is inapposite and not helpful. *Turner v. Prod*, 707 F.2d at 1118 n.11, Appendix to Petition for Certiorari, 17a n.10 (*sic*); *Turner v. Woods*, 539 F.Supp. at 612-613 n.6, Appendix to Petition for Certiorari, 41a-42a.

In *Shea*, this Court found that a Colorado provision allowing only a flat work expense disregard for certain discretionary work expenses was contrary to a then-existing provision in Section 402(a)(7). OBRA subsequently amended this provision specifically to overrule the *Shea* decision. Pub. L. No. 97-35, 95 Stat. 357, 843-845 (1981). It is noteworthy that the specific state plan disapproved in *Shea* required "individual treatment of mandatory payroll deductions and child-care costs," but allowed standardized treatment of "all other work-related expenses." *Shea*, 416 U.S. at 255. The Court never addressed the legislative basis for discounting mandatory payroll taxes as available income since that was not a question at issue in *Shea*.

Having thoroughly reviewed the legislative and administrative record in this case, particularly the pertinent amendments to the Social Security Act enacted in 1939, 1962, 1968 and 1981, the Ninth Circuit correctly interpreted the Act as requiring that mandatory payroll taxes be individually excluded from recipient income pursuant to Section 402(a)(7) in addition to the standard work expense disregard made part of Section 402(a)(8). *See Social Security Act Amendments of 1939*, Pub. L. No. 76-379, 53 Stat. 1360, 1379 (1939); *Public Welfare Amendments of 1962*, Pub. L. No. 87-543, 76 Stat. 172, 189 (1962); *Social Security Amendments of 1967*, Pub. L. No. 90-248, 81 Stat. 821, 881 (1968); *OBRA*, *supra*, 95 Stat. at 843-845. Unlike the contrary Court of Appeals opinions, the Ninth Circuit refused to disregard more than forty years of legislative and administrative history and hold that Congress had not repealed by implication a still vital and operative provision of the Social Security Act.

CONCLUSION

The Ninth Circuit rightly decided this case, and, therefore, it need not be reviewed by this Court.

DATED: February 1, 1984

Respectfully submitted,

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AMICUS CURIAE

BRIEF

NO. 83-1097

IN THE SUPREME COURT OF THE UNITED STATES

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BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONER

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23 pp

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

NO. 83-1097

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Respondents.

BRIEF OF AMICUS CURIAE STATE OF WASHINGTON IN SUPPORT OF PETITIONER

I. QUESTIONS PRESENTED

A. Whether in the calculation of countable income for the purposes of determining eligibility under the Aid to Families with Dependent Children (AFDC) or Refugee Assistance (RA) programs a state is to use, as the starting basis

from which to subtract deductions, gross earned income or, instead, net income after mandatory payroll taxes.

B. Whether in the calculation of countable income the "work expenses" deduction, and the post-OBRA 1981 $75 disregard, included mandatory payroll deductions.

II. STATEMENT OF INTEREST OF AMICUS CURIAE

The State of Washington participates in the federal AFDC and RA programs. Under these programs the State provides eligible recipients with benefits and receives matching funds from the federal government. The State submits a plan for the operation of the programs to the federal government for approval, and the State must conform to its plan and to federal laws and regulations. 42 U.S.C. § 602. Washington State has calculated countable income pursuant to federal

regulations.

The State was sued in 1983 in Federal District Court for Western Washington and was enjoined from using "gross earned income" as a basis from which to calculate countable income. Williamson v. Gibbs v. Heckler, 562 F.Supp. 687 (1983). The State had joined the federal government as a third-party defendant for the State was acting pursuant to and in conformity with federal regulations and sought to avoid jeopardizing federal financial participation.

The State then appealed the Court's preliminary injunction to the Ninth Circuit Court of Appeals, and that Court "deferred" the matter pending its decision in Turner v. Prod, 707 F.2d 1109 (9th Cir. 1983). The Ninth Circuit then ruled against the State of California and the federal government in Turner.

Subsequently, the Federal District Court in Williamson granted summary judgment and a permanent injunction to plaintiffs. The federal government and the State of Washington then appealed that ruling and the issue of attorneys' fees to the Ninth Circuit Court of Appeals.

In response, the Ninth Circuit stayed any ruling in the Williamson case pending this Court's decision on petitioner's appeal of Turner v. Prod. Thus, the Supreme Court's decision, in the Turner case, will also be determinative of the Williamson case in which the State of Washington is involved.

III. INTRODUCTION AND SUMMARY OF ARGUMENT

Washington State, like California in Turner, has calculated countable income for purposes of AFDC and RA program eligibility by using "gross earned income" as the basis from which deduc-

tions are made. It has followed this procedure both prior to, and after, enactment of the Omnibus Budget Reconciliation Act (OBRA) Amendments of 1981. Pub. L. No. 97-35, § 2302, 95 Stat. 844-845 (1981). The District Court enjoined the State from continuing to do so and, instead, ordered the State to use gross income less such mandatory payroll deductions as Federal Income Taxes and Social Security. Williamson v. Gibbs v. Heckler, supra.

The State of Washington here argues in support of petitioner that since both the State and federal government had interpreted federal law with respect to mandatory payroll deductions in a consistent manner for over two decades, great weight should therefore be accorded to the contemporaneous and consistent construction of federal statutes made by the

federal agency charged with their administration.

IV. BACKGROUND

A. Pre-1981 OBRA Amendments Method of Calculation of Countable Income.

Prior to the 1981 Omnibus Budget Reconciliation Act (OBRA) Amendments, the State of Washington in compliance with federal requirements, determined countable income for purposes of eligibility under the Aid to Families with Dependent Children (AFDC) and Refugee Assistance (RA) programs by starting with "gross earned income," then subtracting $30 plus 1/3 of the gross income, and then subtracting work expenses. 45 C.F.R. § 233.20(a)(6)(iv); 45 C.F.R. § 233.20(a)-(2)(iv)(a); 45 C.F.R. § 233.20(a)(7)(i).

B. Post-1981 OBRA Amendments Method of Calculation of Countable Income.

The Omnibus Budget Reconciliation Act Amendments of 1981 (OBRA), supra,

altered the method of calculation of countable income. Thereafter the State began with gross earned income, subtracted any earned income of a child in school, subtracted $75 for work expenses, subtracted up to $160 for child care, then subtracted $30 plus 1/3 of the remainder.

C. Effect of the Federal Court Injunction.

On March 28, 1983, the Federal District Court for Western Washington enjoined Washington State from using "gross earned income" as the basis from which to determine countable income and required the State to start with a net income amount that represented gross income less mandatory payroll deductions - such as Federal Income Taxes and Social Security deductions. Williamson v. Gibbs v. Heckler, supra. On August 1, 1983, the Court granted summary judgment

to the plaintiffs and made the preliminary injunction permanent. The Court specifically found that the pre-OBRA "work expenses" deduction, and the post-OBRA $75 deduction did not include mandatory payroll deductions. The Ninth Circuit reached the same conclusion in Turner v. Prof, supra. The federal courts in the Ninth Circuit thus interpreted federal statutory law and regulations contrary to the meaning given those same statutes and regulations both by the federal government and the State of Washington.

B. Comparison of Methods.

1. Under the pre-1981 OBRA Amendments the formula for determining countable income was:

Gross Earned Income
- ($30 + 1/3 Gross Income)
- Work Expenses
Countable Income

2. After the enactment of the 1981 Amendments the formula became:

Gross Earned Income
- Earned Income of a Child in School
- $75 (Work Expenses)
- A Maximum of $160 for Child Care
- ($30 + 1/3 of the Remainder)
Countable Income

3. Under the Federal District Court order, however, the formula is:

Net Income (Gross Income Less Mandatory Deductions)
- Earned Income of a Child in School
- $75 (Work Expenses)
- A Maximum of $160 for Child Care
- ($30 + 1/3 of Remainder)
Countable Income

E. Financial Impact of Federal Court Decision.

1. As of the date of the injunction the State of Washington calculated the difference between using "gross income" and "net income" (gross income less mandatory deductions) for the average recipient. The State then projected the difference from the date of

the preliminary injunction to the end of the 1983-1985 biennium, from April 1983 through July 1985. The total increased costs came to $4,750,548 for the period. (Brief with attached Affidavit of Laurie Evans in Support of Emergency Motion for Stay. Williamson v. Gibbs v. Heckler. Ninth Circuit Cause No. 83-3725.) Because this total amount includes federal match monies the State made up approximately one-half, or $2,375,000, from its own resources into the AFDC and EA programs to meet the Federal Court's injunction.

2. Washington State also calculated that the average recipient of AFDC, or EA program benefits, and who is employed full time, bears an average of $41.19 in mandatory payroll deductions. The average recipient employed half time bears an average of $16.56 in mandatory deductions. Both figures are below the

$75 deduction allowed in the OBRA 1981 Amendments. The Federal Court in Turner, however, upheld the District Court's injunction preventing the State from counting the $75 towards mandatory payroll deductions.

V. ARGUMENT

1. The State of Washington and the federal government understood that "gross earned income" included income before mandatory payroll deductions were made. Both the State and federal government also understood that the "work expenses" allowance and the OBRA $75 disregard were intended to provide for the mandatory deductions. Both the State and the federal government had consistently and over a period of more than two decades interpreted federal regulations in this manner. Great weight should be accorded to the contemporaneous and consistent

construction of federal statutes made by those charged with their administration. Fleming v. Mohawk Wrecking and Lumber Co., 331 U.S. 111 (1946); Blum v. Bacon, 457 U.S. 132, 141 (1982).

This principle is particularly true where the contemporaneous and practical interpretation has been unchallenged for a considerable length of time. Commissioner v. First Security Bank of Utah, 405 U.S. 394, 402 (1972). The fundamental reasons underlying this principle are that both certainty in the law is assured and those individuals who are affected may justifiably rely upon that same law. Allen v. Grand Central Aircraft Co., 347 U.S. 535 (1954); United States v. Hill, 120 U.S. 169, 182 (1887); C. Dallas Sands, Sutherland Statutory Construction, § 49.03 (4th ed. 1973).

The State of Washington argues in

support of petitioner that the principles of certainty of law and justifiable reliance are of great importance where the state must interpret and apply complex federal programs such as Aid to Families with Dependent Children and Refugee Assistance. The state needs to know with certainty the terms and conditions placed upon the federal grants in order to be able (1) to act with foresight and knowledge as to the specific local problems the grants are designed to remedy, (2) to determine the extent to which the grants will remedy the local problems, and (3) to determine the economic commitment the state must make to operate the programs.

The Ninth Circuit Court of Appeals' holding in Turner v. Prod, supra, ignores the fundamental principles of certainty of law and justifiable reliance by

reversing reasonable, consistent, contemporaneous, and long-term interpretation of federal law critical to the operation of the AFDC and RA programs. The Ninth Circuit holding makes the State merely an administrative arm of the federal government by failing to address (a) the differences between the State's interest and the federal government's interest, and (b) how certainty of law and justifiable reliance are crucial principles in the present case to the protection of the State's local interests.

2. A state that participates in the federal AFDC and RA programs is required to provide benefits to all persons who are eligible under the program requirements. King v. Smith, 392 U.S. 309 (1968); Burns v. Alcala, 420 U.S. 575, 580 (1975). The Court has also traditionally interpreted eligibility

regulations more strictly than other types of regulations concerning need or level of benefits. Quern v. Mandley, 436 U.S. 725, 737-38 (1978); Jefferson v. Hackney, 406 U.S. 535, 545 (1972); Dandridge v. Williams, 397 U.S. 471, 478 (1970); King v. Smith, supra, at 318-19. But it is also established case law that if a state falls out of compliance with federal regulations, federal courts may order prospective injunctive relief against state officials despite the fact that such orders may require payments to recipients out of state treasuries. Edel v. Jordan, 415 U.S. 651, 677-78 (1974). Thus, though the scheme is one of "cooperative federalism," King v. Smith, supra, at 316, the state must strictly comply with federal eligibility regulations, and the state will be held financially liable should it fail to strictly

adhere to these regulations. However, if the State of Washington had interpreted federal regulations as the Ninth Circuit Court of Appeals did in Turner, the State would have been penalized by disallowance of federal matching funds for failure to comply with the regulations as the federal government had interpreted them. 42 U.S.C. § 604. But in complying with the federal regulations as interpreted by the federal government the State has been penalized and forced to distribute approximately $2,375,000 of its own state funds into the AFDC and BA programs over the 1983-1985 biennium pursuant to federal court orders.

The State argues in support of petitioner to avoid the awkward posture the Ninth Circuit decision in Turner v. Prof, supra, has placed upon the State. The methods of statutory analysis used to

define the federal standards of eligibility should be no different from those used in solving other problems of statutory construction. Burns v. Alcala, supra, at 580 (1975). Further, great weight should be given to the federal administrative agency charged with administering the federal AFDC and BA programs. Where the state and the federal government have reasonably interpreted statutes to have a specific meaning over many years, then this interpretation should prevail. Blum v. Bacon, supra; Commissioner v. First Security Bank of Utah, supra.

VI. CONCLUSION

The State of Washington has consistently for a period of over two decades used gross earned income as the basis from which to determine countable income for purposes of AFDC and BA program

eligibility. Washington has consistently interpreted the "work expenses allowance" and the OBRA 1981 $75 disregard as the federal provisions to cover mandatory payroll deductions such as Federal Income Taxes and Social Security deductions. Washington has interpreted federal regulations to require this, and has followed federal administrative advice to this effect. The Ninth Circuit Court of Appeals' decision in Turner v. Prod, supra, has in effect, resulted in Washington State reallocating $4,750,548 (including approximately $2,375,000 of its own monies) into the AFDC and RA programs. Washington State argues that this effect of the Turner v. Prod, supra, decision is contrary to congressional intent, as argued by the petitioner in her appeal, and is contrary to applicable principles underlying statutory

interpretation. Thus, the State of Washington urges the Court reverse the Turner v. Prod, supra, decision to ensure proper interpretation and certainty in federal law, and to secure, as a matter of public policy, the State's justifiable reliance upon the law.

DATED this 11th day of April, 1984.

Respectfully submitted,

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RESPONDENT'S

BRIEF

No. 83-1097

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BRIEF FOR STATE RESPONDENTS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, in computing the grant for an AFDC recipient who has income from earnings (i.e., "earned income"), the State must allow a deduction for payroll deductions for taxes, despite the fact that 42 USC section 602(a) (8) (the section which delineates the allowable deductions from "earned income") does not provide for any such deduction.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

TABLE OF AUTHORITIES—Continued

No. 83-1097

In The
Supreme Court of the United States
October Term, 1983

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BRIEF FOR STATE RESPONDENTS IN SUPPORT OF PETITIONER

INTRODUCTORY STATEMENT

California, like all the other States, participates in the federal welfare program known as Aid to Families With Dependent Children ("AFDC") enacted by Congress in Section IV of the Social Security Act of 1935, as amended. Section 601 *et seq.;* all section references are to the Act as codified in Title 42 of the United States Code. As its name implies, the AFDC program provides cash assistance to families with dependent children. For the most part, these families consist of a mother and her children.

The extent to which a family is "needy", and thus entitled to AFDC benefits, turns upon the extent to which the family has "income or resources." Section 602(a) (7). This case involves the term "income" and presents the question of how "income" is to be determined in the case of families that have "income" from employment (i.e., "earned income").

The State respondents agree with the position advanced by the U.S. Department of Health and Human Services ("HHS"), to wit, that in computing the family's "income" from employment, the State must start with the total wages and subtract the various deductions and disregards set forth by Congress in section 602(a) (8). The State respondents agree with HHS' position that Congress did not allow an additional, unspecified deduction for the amount withheld from the employee's paycheck for taxes.

SUMMARY OF ARGUMENT

1. The decision of the Court of Appeals violates the words of the statute. In the 1981 OBRA amendments, Congress set forth in section 602(a) (8) the precise manner in which "income" from employment (i.e., "earned income") is to be computed. Congress did not provide a deduction for taxes withheld from paychecks. When the 1981 statute setting forth the allowable deductions from "earned income" was enacted, the phrase "earned income" was universally understood, by the administrators, the courts and the Congress, to refer to an employee's total salary, not salary less amounts withheld for taxes. Accordingly, no deduction for such amounts is allowed.

2. The decision of the Court of Appeals defeats congressional intent. OBRA was enacted in order to *reduce* federal expenditures (and the federal deficit). The amendment to section 602(a) (8) was intended to *reduce* expenditures for welfare grants to AFDC families that have earnings from employment. As construed by the Ninth Circuit Court of Appeals, the statute would have just the opposite result—it would *increase* welfare grants to virtually all AFDC families with earnings.

3. The decision of the Court of Appeals misapplies the "available income" regulation. Money that is withheld from an employee's check to pay taxes or any other obligation is still part of the employee's "income." An employee's wages are "income" to the employee, regardless of whether the wages are needed or used to pay a tax obligation, repay a loan or pay any other ordinary cost of support and maintenance. In any event, OBRA made many significant changes in the "available income" rule.

4. The decision of the Court of Appeals results in irrational and illogical distinctions. The Court of Appeals' distinction between payroll deductions for taxes and other mandatory payroll deductions for items such as union dues and retirement plan contributions defies logic. As for taxes themselves, the Court of Appeals' apparent distinction between taxes paid by payroll deduction and taxes paid directly by the employee defies rational analysis. By so holding, the Court of Appeals has violated the axiom that statutes should be construed with at least a modicum of common sense so as to avoid unjustified distinctions.

ARGUMENT

I.

CONGRESS DID NOT PROVIDE A DEDUCTION FOR AMOUNTS WITHHELD FROM WAGES FOR TAXES.

This case does not present an esoteric or obtuse question of constitutional law which involves the consideration of difficult social or moral dilemmas. To the contrary, this case presents a straightforward interpretation of the 1981 amendments to the AFDC statutes which control how the States must compute the welfare grants for recipients that have income from earnings. The point we wish to stress is a simple one, to wit, when construing a statute enacted in 1981, the Court should look at the words used in the 1981 statute and how they were understood in 1981.

Prior to the 1981 OBRA amendments, the statutory basis for deducting taxes and other expenses relating to the earning of income was section 602(a) (7), which provided that ". . . the State agency shall, in determining need, take into consideration any other income [of the claimant] as well as any expenses reasonably attributable to the earning of any such income." Section 602(a) (8) then allowed a $30 plus ⅓ "disregard" of the "earned income" of the claimant as an incentive for working.

The 1981 OBRA amendments drastically changed that approach. First, the language allowing the deduction for the "expenses reasonably attributable to the earning of any such income" was removed from section 602(a) (7). Next, all the allowable deductions from "earned income", and the order of their allowance, were set forth in section 602(a) (8).

Therefore, the single question posed by this case is whether Congress in 1981, when it used the words "earned income" in section 602(a) (8), was referring to an employee's total wages or the employee's wages less those payroll deductions for taxes. We submit that in 1981 the phrase "earned income" was universally understood to mean an employee's total wages. The point would seem undisputable—

(1) The Regulations

Prior to the 1981 OBRA amendments, section 602(a) (8) provided the $30 plus ⅓ disregard from "earned income." For over a decade, the HHS regulations defined "earned income" as including the employee's total wages without any deduction for taxes. 45 CFR § 233.30(a) (6) (iv).

(2) The Courts

Decisions of the Court of Appeals consistently upheld the interpretation that "earned income", in the case of wages, meant the employee's total salary. *Arizona St. Dept. of Pub. W. v. Department of Health, E & W* (9th Cir. 1971) 449 F.2d 456, 469-71; *Connecticut St. Dept. of Pub. W. v. Department of H, E & W.* (2d Cir. 1971) 448 F.2d 209, 214-5.

In 1974, this Court recognized the practice of treating the total wages as "income" and deducting payroll deductions as "work related expenses". *Shea v. Vialpando* (1974) 416 U.S. 251, 254-5.

(3) The Congress

In 1972, when it enacted the Supplemental Security Income ("SSI") program to provide cash assistance to

needy aged, blind and disabled persons, Congress defined "income" from salaries to be "wages", not "take-home pay." Section 1382a(a) (1) (A).

Thus, by the time Congress enacted the OBRA amendments in 1981, the administrators, the courts and the Congress all deemed the phrase "earned income" to mean the total salary or wages of the employee. The Ninth Circuit's conclusion that in 1981 Congress had some other notion in mind simply defies common sense.

In fact, the Ninth Circuit's conclusion that "earned income" means wages after payroll deductions for taxes was not even the argument advanced by the plaintiffs. In the Courts below, the plaintiffs conceded that "earned income" under 602(a) (8) meant wages without any deduction for payroll deductions. They argued, however, that in making the grant computation, the State must first subtract payroll deductions from wages under section 602(a) (7) to arrive at "income" and then, as a second step, subtract the section 602(a) (8) deductions.

Thus, for a person who earned $600 and who had $50 of payroll deductions, plaintiffs argued that the person's total "income" was $550, but that his "earned income" was $300 for purposes of computing the deductions under section 602(a) (8). That approach does as much violence to the words of the statute as does the approach taken by the Ninth Circuit.

Section 602(a) (8) (A) provides that

> "in making the determination under paragraph 7, the State agency—(ii) shall disregard from the earned income . . . the *first* $75 of the total of such earned income . . . ."

Yet, under plaintiff's approach, that is a literal impossibility because, in our example, the *first* $50 was already disregarded under the computation to reduce wages to "income." Stated another way, if payroll deductions must *first* be deducted under section 602(a) (7), then it was literal nonsense for Congress to say that the "first $75" is to be disregarded under section 602(a) (8).

The only way to make any sense out of the statute is to read it exactly as the federal agency has said it was intended to read, to wit, in computing the deductions from wages, the State should make only the deductions set forth in section 602(a) (8).

II.

THE DECISION FRUSTRATES CONGRESSIONAL INTENT.

The decision of the Court of Appeals not only violates the express words of the OBRA amendments, it defeats the Congressional purpose for which the amendments were made.

It cannot be gainsaid that the overriding purpose of the OBRA provisions in question was to reduce the amount of benefits payable to AFDC recipients who have jobs. After all, as its name implies, OBRA is an omnibus budget reconciliation act, designed to reduce expenditures in all departments of government so as to bring total expenditures in line with previously established goals. PL 97-35, sec. 2; 95 Stat. 357. As stated in the committee reports, the expected revenue effect of the amendments in question was to reduce expenditures by $206,000,000. U. S. Code Cong. Adm. News No. 7A, September 1981, page 447.

It is undisputed that the $206 million figure was arrived at by applying the statutory amendments in precisely the manner in which they were applied by the State and federal agencies in this case. Affidavit of McMahon.

However, under the Court of Appeals' decision, a working AFDC recipient gets a deduction for payroll deductions for taxes *plus* the standard deduction of $75 *plus* a deduction for child care expenses up to $160 for each child. For most recipients in most States, this is more than they were allowed to deduct as "work related expenses" under section 602(a) (7) before the OBRA amendments. Stated another way, the Ninth Circuit has construed a statute designed to *decrease* benefits to families with income from earnings in a manner which mandates an *increase* in grants to virtually all such families.

III.

THE "AVAILABLE INCOME" CONCEPT DOES NOT APPLY TO MONIES WITHHELD TO PAY TAX OBLIGATIONS.

The Court of Appeals appears to have been persuaded by plaintiffs' "available income" argument, which goes something like this—(1) the monies withheld from the employee's paycheck to pay tax obligations were not "available" to the employee and, accordingly, were never part of the employee's "income", and (2) the OBRA amendments, because they did not amend the word "income" in section 602(a) (7), made no change in the "availability" concept. The argument fails on both counts—amounts withheld to pay tax obligations were not excludable under the "available income" concept and, even if they were, the OBRA amendments made substantial changes in the "available income" rule.

A. The "Available Income" Concept Did Not Apply to Monies Withheld from Wages to Pay Tax Obligations.

The "availability" concept finds its expression in the HHS regulation which provides that, in determining the applicant's need, the State must consider the effect of the applicant's "available" income and resources. 45 CFR § 233.20(a) (3) (ii) (D). As stated by this Court in *King v. Smith* (1968) 392 U.S. 309, at 319, fn. 16,

> "This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual."

The "availability" rule was again noted in *Lewis v. Martin* (1970) 397 U.S. 552, in which this Court upheld the federal regulation which provided that the States could not presume that the income of a stepparent or "man assuming the role of spouse" was actually "available" to the AFDC family with which he lived.

Thus, the States were prohibited from presuming that income of a person outside the AFDC family unit (such as a "substitute father", "man assuming the role of spouse" or stepparent) was a part of the income of the family unit. But that has nothing to do with the question at hand. We are not dealing here with wages of someone outside the AFDC family unit. To the contrary, we are dealing here with the wages of the AFDC family unit member, normally the mother.

Money that is earned by an AFDC family member does not cease to be that person's "income" just because it is needed or used to pay an obligation for taxes.

Taxes are just one of the many obligations that constitute the costs of support and maintenance in our com-

plex society. For example, the AFDC family that lives in its own home incurs liability for property taxes. The AFDC family that owns an automobile incurs liability for vehicle license fees. The AFDC family that lives in a State with a sales tax (such as California) will pay sales tax on most everything it purchases. (In Hawaii, the sales tax even applies to food.) The AFDC family with a telephone will pay federal and State excise taxes on telephone charges. The AFDC family member that works will pay Social Security (OASDI) and income taxes.

One cannot live in our complex society without incurring liability for any number of taxes. Those tax liabilities are just one of the many costs of support and maintenance that a person incurs in order to live. The fact that a portion of a person's wages is used to pay those tax liabilities does not mean that the money is excluded from "income" under the "availability" regulation.

Nor is it relevant that the obligation is paid by way of mandatory payroll deduction. See *Powell v. Austin* (DC ED Va, 1977) 427 F.Supp. 749, in which the Court held that garnished wages were not excludable from "income" under the "available income" regulation. The court stated:

> "Garnished wages, however, involve real income earned by the recipient and 'available' in the sense that they provide actual, not assumed benefits to the recipients, in the form of extinguishing part of an outstanding debt." 427 F.Supp., at 751.

B. In Any Event, the OBRA Amendments Changed the "Availability" Concept in Significant Respects.

Even if the portion of the AFDC family member's wages withheld to pay taxes were, prior to OBRA, deducted from "income" under the "availability" concept, that rule was changed by the OBRA amendment to section 602(a) (8), in which Congress specifically set forth the deductions from "income" from employment.

The plaintiffs have consistently argued that the "available income" rule was not changed because Congress did not amend the word "income" in section 602(a) (7). That argument fails because Congress made several changes in the "available income" rule without amending the word "income" in section 602(a) (7).

The most significant change relates to stepparent income. Prior to OBRA, the income of a stepparent could not be deemed "available" to the AFDC family unit. *Lewis v. Martin* (1970) 397 U.S. 552. But in OBRA Congress specifically changed that rule. Now, after certain deductions, the income of the stepparent is deemed available to the AFDC family. Section 602(a) (31); PL 97-35, sec. 2306. Thus, the most basic "available income" rule was reversed by Congress without any amendment of the word "income" in section 602(a) (7).

Likewise, in OBRA Congress enacted the "lump sum" rule, pursuant to which a lump sum of money received by a family is deemed available to meet the family's needs in future months, despite the fact that the family may spend the money before the period of ineligibility expires. Section 602(a) (17); PL 97-35; sec. 2304. That result could not have been reached under the pre-OBRA "availability" concept. Thus, again Congress significantly amended the "available income" rule without a specific amendment to section 602(a) (7).

In short, the premise of plaintiff's position, namely, that the "available income" concept was not changed by

OBRA, is simply wrong. Even if prior to OBRA wages were excluded from "income" to the extent they were withheld to pay taxes under the "available income" regulation (which they were not), that result was changed by the amendment of section 602(a) (8), just as the "available income" rules were changed in other respects by the addition of sections 602(a) (17) and (31).

IV.

THE DECISION OF THE COURT OF APPEALS PRODUCES ILLOGICAL AND IRRATIONAL DISTINCTIONS.

The decision of the Court of Appeals creates distinctions that are illogical and irrational, both legally and factually.

For example, the Court of Appeals concluded that amounts withheld from the paycheck for taxes are not "income" because they are not "available" to the employee. Yet the Court of Appeals concluded that other mandatory payroll deductions, such as those for mandatory retirement plan contributions or mandatory union dues, are not to be deducted. But what legal or factual basis is there for concluding that amounts withheld to pay a potential income tax liability are not "available" whereas amounts withheld to pay an actual union dues liability are "available"? There is none. That simple example demonstrates the fallacy in the Court of Appeals' "available income" analysis.

But even more glaring is the illogical distinction made by the Court of Appeals' decision when applied to income taxes themselves. Take, for example, the situation of two working AFDC mothers who both earn the same amount of money doing dressmaking work. One works for a local

store as an employee; the other works in her home as an independent contractor. The first would have taxes withheld; the other would pay her taxes on quarterly tax returns. The taxes, however, would be the same. Under the Court of Appeals' decision, the "income" of the first would be reduced by the amount of the withheld taxes. The other would have no such deduction from "income." What possible logic supports the conclusion that Congress intended the "income" of one to be computed differently than the other? There is none. Statutes should be construed with at least a modicum of common sense so as to avoid irrational results.

The irony of the situation is that if Congress had clearly provided a deduction from "income" for amounts withheld from wages to satisfy tax obligations but had not provided a similar deduction for taxes paid directly by the worker, the same attorneys representing plaintiffs in this case would undoubtedly be in court arguing that such a statutory provision denied equal protection of the laws. And they would probably be right.

CONCLUSION

The decision of the Court of Appeals does violence to the words of the statute, defeats congressional intent, completely misconstrues the "available income" concept and produces illogical distinctions.

The decision of the Court of Appeals should be reversed with directions to vacate the injunction of the District Court.

Dated: May 10, 1984

Respectfully submitted,

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JOINT

APPENDIX

No. 83-1097

In the Supreme Court of the United States

OCTOBER TERM 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

SANDRA TURNER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED JANUARY 4, 1984
CERTIORARI GRANTED FEBRUARY 27, 1984

TABLE OF CONTENTS*

*The opinions of the district court and the court of appeals are printed in the appendixes to the petition for writ of certiorari and have not been reproduced.

**DOCKET ENTRIES,
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

82-4566
D.C. No. C-81-4457-TEH
Consolidated: 82-4567, 83-4552, 82-4599
Companion: 82-4616 & 82-4627

SANDRA TURNER, DEBRA SCRUGGS, AND JERRYLEAN BAKER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED,
PLAINTIFFS-APPELLEES,

v.

JEROLD PROD ET AL.,
DEFENDANTS.

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA,
DEFENDANT AND THIRD-PARTY PLAINTIFF,

v.

MARGARET HECKLER SECRETARY OF HEALTH AND HUMAN SERVICES,
THIRD-PARTY DEFENDANT-APPELLANT.

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[Notice of Appeal Filed: Sept. 27, 1983]
[Amended: Oct. 18, 1982]
Filed in DC: Nov. 25, 1982]

Hon. THELTON E. HENDERSON, *D.C. Judge*

DATE	FILINGS-PROCEEDINGS
1982	
Oct. 8	DOCKET NUMBER ASSIGNED.
Oct. 19	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. -rmc-
Oct. 28	Filed as of Oct. 27 in 82-4616 apits' (WOODS, et al.) civil appeals docketing statement. 10/25 (Confatt) -rmc-
Nov. 5	Filed in 82-4552, order (CONFATT FOR THE CT) (1) these appeals (82-4552, 82-4566/4567 and 82-4599) are consolidated for all purposes, and any cert of record filed in appeal No. 82-4552 shall be deemed filed in the consolidated appeals; (2) on or before Dec. 17, the federal and state apits shall file a joint opening brief of not more than 50 pages or the federal apit shall file an opening brief of not more than 40 pages and the state apits shall file an opening brief of not more than 20 pages; (3) apis shall file a brief of not more than 50 pages on or before Jan. 24, 1983; (4) within 14 days of the date of service of apies' brief, the federal and state apits may file a joint reply to separate reply briefs totalling not more tan 20 pages. -rmc-
Nov. 10	FILED AS OF NOV. 9, IN 82-4552, CERTIFICATE OF RECORD. (N/T) -rmc-
	"FOR ALL FURTHER PROCEEDINGS SEE 82-4552"
April 11	ARGUED AND SUBMITTED BEFORE: ELY, SKOPIL, FERGUSON, CJJ. jw
May 23	Recv'd in 82-4552, ltr dated May 23, from M.N. Aaronson, re: opinion of the Southern District of New York, PANEL

Jun 10	ORDERED OPINION (FILED FERGUSON) FILED & JUDG TO BE FILED & ENTD.
Jun 10	FILED OPINION—AFFIRMED.
Jun 10	FILED & ENTERED JUDGMENT. -ot-
Jun 20	Filed Aples' Bill of Cost. 6/20 -ot-
Jun 22	Filed Apits' Suggestion For Rehearing En Banc And Petition For Rehearing. 6/22 (Panel & Active Judges) -ot-
Aug 11	Filed Order (ELY, SKOPIL & FERGUSON, CJJ) The Opinion filed on Jun 10, 1983, shall be amended as follows. (See Case file) ogm
Aug 24	Filed in 82-4552, Orig & 33 Emergency motion for filing of supplemental exhibit (Third Circuit Opinion filed 8/17/83) to state apit's suggestion for rehearing en banc and petition for rehearing. (Panel, active judges) 8/24 ogm
Sept. 6	Filed in 82-4552 Order (FERGUSON) The motion of defendants/Apits for filing of supplemental exhibit is granted. lw
Sept. 7	Filed in 82-4552 Order (ELY, SKOPIL, FERGUSON) The petition for rehearing is denied, and the suggestion for a rehearing en banc is rejected. lw
1983	
Sept. 15	MANDATE ISSUED
Nov. 4	Filed Order (ELY, SKOPIL & FERGUSON, CJJ) The motion of plaintiff-apies' to tfr the consideration of their application for apellate attys' fees is granted. -ot-
1984	
Jan. 16	Recvd SC notice of filing of cert on 1/4/84, SC #83-1097 EM
March 5	Filed in 82-4552 as of March 1, certified copy of SC order of 2/27/84 granting cert. (PANEL) tsp

DOCKET ENTRIES

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

SANDRA TURNER, DEBRA SCRUGGS, AND JERRYLEAN BAKER, ON BEHALF OF THEMSELVES AND ALL OTHERS SIMILARLY SITUATED

v.

MARION J. WOODS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS THE EXECUTIVE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; KYLE MCKINSEY, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA: MARY ANN GRAVES, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS DIRECTOR OF THE DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA; AND THE DEPARTMENT OF FINANCE OF THE STATE OF CALIFORNIA

CLASS ACTION CIVIL RIGHTS
42 USC § 1983

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1981		
Nov 24	1	COMPLAINT: Summons Issued.
	2	Clerk's Order Setting Status Conference—3/1/82 9:00 a.m.
Nov 25	3	Plaintiffs' motion for TRO and Order to show cause and preliminary injunction.
	4	Plaintiffs' certification of counsel.
	5	Plaintiffs' memorandum in support of motion #3.
	6	Plaintiffs' exhibits in support of TRO.
	7	Plaintiffs' declaration of Sandra Turner.
	8	Plaintiffs' declaration of Debra Scruggs.
	9	Plaintiffs' declaration of Jerrylean Baker.
	10	Plaintiffs' declaration of Armand Hill.
	11	Plaintiffs' declaration of Alan Crawford.
Nov 25	12	TEMPORARY RESTRAINING ORDER AND ORDER TO SHOW CAUSE—Hearing on OSC 12/7/81 10:00 AM. Defendant's opposition due 12/2/81. TEH
Nov 30	13	MINUTES: 11/27/81 (CR/Wanda Harris) Hearing on defendants' motion for clarification of TRO-GRANTED. TEH
	14	Plaintiffs' declaration of Mark N. Aaronson.

	15	*Plaintiffs' memorandum in support of order to show cause re contempt.*
	16	ORDER TO SHOW CAUSE *why defendants shouldn't be punished for contempt to court for failing to obey* TRO-hearing 12/1/81 2:00PM. TEH
Dec 1	17	*Plaintiffs' proof of service of summons &* complaint, *etc. upon defendants* Marion Woods, Kyle McKinney & CA Dept. *of* Social Services by hand 12/1/81 (substituted service).
	18	*Plaintiffs' proof of personal service of #14 &* 15.
Dec 2	19	MINUTES: 12/1/81 (CR/Wanda Harris) Hearing on OSC why *defendants* should not be held in contempt—SUBMITTED. Preliminary Injunction hearing of 12/7/81 vacated and reset for 12/17/81 9:00 a.m. Opening brief due 12/11/81 and reply brief due 12/15/81. TEH
	20	ORDER setting briefing schedule and hearing re preliminary injunction TRO issued 11/25/81 shall remain in full effect until 12/17/81 hearing. TEH
Dec 4	21	*Plaintiff's proof of service* by mail.
	22	SUMMONS RETURNED-EXECUTED upon Mary Ann Graves, Director of Dept. *of Finance* 11/30/81. upon Marion Woods, Kyle McKinney, and CA Dept. *of* Social Services 12/1/81
	23	*Plaintiff's proof of service* to TRO & *order* to show cause.
Dec 11	24	*Defendants' points and authorities in opposition to motion for peliminary injunction.*
Dec 14	25	1st AMENDED COMPLAINT.
Dec 15	26	*Plaintiffs' reply memorandum to defendants'* opposition to motion for preliminary injunction.
	27	*Plaintiffs' supplemental exhibits in support of #26.*
	28	*Plaintiffs' declaration of* Alan Crawford.

		Plaintiffs' proposed preliminary injunction.
Dec 17	29	*Plaintiffs' supplemental exhibit* P in support of reply memo.
Dec 18	30	MINUTES: (CR/W. HARRIS) *order to show cause why prelim. inj. should not issue submitted.*
Dec 17*	31*	ORDER: Temporary Restraining Order issued 11-25-81 shall remain in full force through 12-31-81. TEH.
Dec 21	32	*Plaintiffs declaration*—Debra Scruggs.
Dec 22	33	*Preliminary injunction order* TEH
Dec 31	34	*State defendants report of compliance with preliminary injunction.*—exhibit A & B
1982		
Jan 4	35	*Plaintiff's certification*—Mark H. Aaronson in support *of ex parte application.*
	36	ORDER: plf's motion for review & clarification set 1-13-82/1:30 pm TEH
	37	*plaintiff's ex parte application for order shortening time to hear motion for review and clarification.*
Jan 5	38	*Plaintiffs notice of motion & motion for review & clarification of prelim. injunction. set* 1-13-82/1:30 . —*Memo of points & authorities* —Exhibits A, B & C
Jan 7	39	Defendants M.J. Woods and Dept of Social Svcs response to motion for review and clarification of prelim. injunction.
Jan 8	40	Defendants M.J. Woods, L. McKenney & Dept. *of* Social Svcs *of* Calif. 1st AMENDED COMPLAINT.
	41	*Plaintiffs reply to response to motion for review and clarification.* —exhibit 1A, 1B, 1C, 1D, 1E & 2
Jan 6*	42*	*Plaintiff's proof of service by mail of summons and first amended class action complaint, 12-21-81.*

Jan 11	43	Defendants Mary Ann Graves and Dept. of Finance's ANSWER TO 1st AMENDED COMPLAINT.
Jan 13	44	MINUTES: (CR/W. Harris) Plaintiff's motion for review and clarification of prelim. injunction submitted; hearing motins continued to 2-16-82; plaintiff's motion filed by 1-22-82, defendant's response filed by 2-2-82, plaintiff's reply filed by 2-8-82. TEH
Jan 14	45	Defendant Woods, McKinsey, and Department of social services' THIRD-PARTY COMPLAINT Summons issued. Exhibits A&B
Jan 19	46	ORDER: that plaintiff's motion for review and clarification of the court's 12-22-81 preliminary injunction is DENIED without prejudice. TEH
Jan 20	47	Plaintiff's amended notice of motion. —certificate of counsel
Jan 22	49	Defendants Marion J. Woods and Kyle McKinsey, and deft. and third party plaintiff Department of Social Services' supplemental report re preliminary injunction.
Jan 23	50	ORDER: that Donald Currey show cause before the court on 3-8-82/10AM why he should not be punished for contempt of court for failing to comply with the preliminary injunction issued 12-22-82. TEH
Feb 18	51	MINUTES: (CR/W.Harris) 2-18-82 Phone status report held- cont. to 3-8-82/10AM for contempt hearing and status report. Order to be prepared by deft. TEH
Feb 19	52	Plaintiffs' notice of motion and motion for order certifying action as a class action. Set 3-22-82/10AM.
	53	—memo of points and authorities in support of— Received: proposed order certifying action as a class action.
Feb. 22	54	Statement of personal service to order to show cause dated 2-19-84

Feb 26	55	Defendants' notice of non-opposition to this action being certified as a class action.
	56	STIPULATION AND ORDER: that all-county letter is approved by the Court for issuance by the Dept. of Social Services. TEH
Mar 2	57	ORDER: appointing plif's council to assist in prosecution of contempt action against Donald E. Currey. TEH
	58	Defendants Mary Ann Graves and Dept. of Finance's notice of nonopposition to plif's motion for order certifying action as a class action.
Mar 3	59	Plaintiff's exparte application for order sortening time in which to hear plif's motion for review of Soano County notices of action.
	60	—certification of Mark N. Aaronson in support of—
	61	ORDER: that plif's motion for review will be heard 3-8-82/10AM. TEH
	62	Plaintiff's notice of motion and motion for review of certain notices of action sent AFDC recipients by Solano County. 3-8-82/10AM
	63	Defendant Cltee, Director of Solano County Public Welfare Dept.'s response to order to show cause re: contempt.
	64	—Stipulaton re Solano County Forms
Mar 8	65	MINUTES: (CR/W.Harris) Status report held, Cont. to 4-26-82/11AM for further status report. Order to show cause why Donald E. Currey should not beheld in contempt, and plif's motion for review of certain notices of action sent AFDC recipients by Solano County—ordered submitted. TEH
Mar 15	66	Third-Party Defendant's notice of non-opposition re motion by plif to certify case as class action.
Mar 22	67	ORDER: certifying action a a class action and appointing class counsel—plif's counsel of record. TEH

	68	MINUTES: (CR/W.Harris) Pltf's motion to certify action as a class action is granted. TEH
Mar 23	69	ORDER: that both parties file a brief memo in support of their respective proposed order regarding on the order to show cause re: contempt against Solano County. TEH
Apr 1	70	Plaintiff's memo in support of proposed order for adjudication of contempt.
	71	Defendant's brief re Solano County Compliance order.
Apr 8	72	Plaintiff's reply memo re Solano County contempt action.
	73	Defendants Woods, McKinney and Dept. of Social Services' reply brief re Solano County compliance order.
Apr 16	74	Federal Defendant's position re recoupment of benefits.
	75	ORDER: that attached All-County letter is approved for issuance by the Dept. of Social Services. Further, Dept. of Socil Services shall instruct each county welfare director to promptly transmit to the Deft. examples of all notices of action issued by the County which deviate in any way from the approved langugo and format. TEH
Apr 26	76	MINTUES: (CR/W.Harris) Status report held. Pre-trial conference set 3-21-83/3PM. Cont. to 5-10-82/10AM for hearing on notices to counter. Opening brief filed on 4-28-82. Answer brief filed on 5-4-82. Reply brief filed on 5-7-82. Court trial set 3-29-83 at 9:30AM. Discovery cut-off 2-21-83. TEH
Apr 27		Received: request for approval of instructions.
	77	ORDER FOR PRETRIAL PREPARATION: see #76 for schedule. TEH
Apr 28	78	Defendants Marion J. Woods, and Dept. Social Services' amended request for approval of instructions.
May 4	79	Plaintiff's response to defts' request for approval of instructions

	80	—declaration of Peter L. Wright.
May 7	81	Defendants Woods, McKinney and Dept. of Social Services' reply re request for approval.
May 10	82	MINUTES: (CR/W.Harris) Hearing re motions to counter—hearing held. Order to be prepared by deft.
	83	ORDER: that All County Letter (attached to original) is approved for issuance by the Dept. of Social Services. Further, the Dept. shall instruct each county welfare director to promptly transmit to the Dept. examples of all notices of action issued by the county which deviate in any way from the approved language and format. The Dept. is ordered to file promptly with the Court, and serve upon counsel for pltfs, copies of any such notices of action. TEH
	84	Defendants Woods, and Dept. of Social Services' submission no. 1 of notices of action that deviate from approved language and format.
May 13	85	defendants' submission no. 2 of notices of action that deviate from approved language and format.
May 14	86	ORDER: that each party shall submit by 5-21-82 a brief describing the legal arguments and authorities relating to whether defts can and should be barred from recouping as overpayments aid amounts restored to AFDC recipients who received defective notices of action. TEH
May 21	87	Plaintiffs' supplemental memo re Lolano County contempt.
	88	Defendants Woods, McKinney and Dept. of Social Services' brief in response to order requiring supplemental briefing.
	89	Third-Party defendant Richard Schweiker's response to pltf's proposed order for adjudication of contempt.
May 24	90	Plaintiffs' notice of motion and motion for partial summary judgment and permanent injunction. Set 6-21-82/10A.M.

—memo of points and authorities in support of—
—declaration of Catherine Bass in support of—
—RECEIVED proposed order.

91 —Exhibits in support of—

May 25 92 Plaintiffs' ex parte application for order shortening time in which to hear pltfs' motion to declare certain notices inadequate.

93 ORDER: that pltfs motion shall be heard 6-14-82/10AM. TEH

94 Plaintiffs' motion to declare certain notices inadequate. Set 6-14-82/10AM.

95 —memo of points and authorities in support of—
Received: proposed order—

May 26 96 Federal Defendant's closing brief.

May 28 97 Non-Federal defendants' ex parte application for order shortening time.

98 ORDER: that defts motion shall be heard 6-21-82/10AM. Further, third-party defts' opposition memo shall be filed by 6-10-82, and third-party pltf's reply memo shall be filed by 6-14-82. TEH

99 Non-Federal Defenants' motion for summary judgment and permanent injunction. Set 6-21-82/10AM.

100 —points and authorities in support of—

101 —declaration of John J. Klee—

June 2 102 Defendants McKinney, Woods and Dept. of Social Services' response to pltfs' motion to declare certain notices inadequate.
Received: order—

June 3 103 STIPULATION AND ORDER: that pltfs' motion to declare certain notices inadequate is withdrawn. Further argument on the recoupment issue in the Solano County County Contempt Proceeding in this matter will be heard 6-14-82/10AM. TEH

June 7 104 Third-Party defendant Richard Schweiker's memo in support of motion for summary judgment.

105 Defendants Woods, McKinney and Dept. of Soci Services' response to pltfs' motion for partial summary judgment and permanent injunction. Set 6-21-82/10AM.

June 9 106 Plaintiff's proof of service as to #105—dated—6-4-82.

107 Defendants Marion J. Woods and Dept. of Social Services' submission No. 3 of notices of action that deviate from approved language and format.

June 9 Received: order denying pltf's motion for summary judgment.

June 10 108 Defendants Mary Ann Graves and Dept. of Finance's response to pltfs' motion for partial summary judgment and permanent injunction. Set 6-21-82/10AM.

June 14 109 MINUTES: (CB/W.Harris) Further argument on the recoupment issue in the Solano County Contempt Proceeding. Ordered: submitted. TEH

110 Plaintiffs' closing memo in support of motion for partial summary judgment and permanent injunction.

June 21 111 MINUTES: (CB/W.Harris) Pltf's motion for partial summary judgment and permanent injunction, and non-Federal defts' motion for summary judgment and permanent injunction—both ordered submitted. TEH

June 24 112 Defendants Marion J. Woods and Dept. of Social Services' submission no. 4 of notices of action that deviate from approved language and format.

July 2 113 ORDER: that deft Donald E. Carney, Director of the Solano County Public Welfare Dept., be held in contempt of Court. (See original for details). TEH

July 14		Received: Letter to TEH from John J. Klee re amended order re contempt. Dated 7-14-82.
July 16	114	AMENDED ORDER RE CONTEMPT: see original. TEH
	115	ORDER RE: RECOUPMENT: that no recoupments be made or "stuffers" regarding recoupment be sent to recipients until the Court rules on this issue. TEH
July 29	116	OPINION AND ORDER: that defts, their successors in office, their agents, officers and employees and representatives, including employees of county welfare departments, are permanently enjoined from including mandatory payroll deductions such as federal, state and local income taxes, Social Security taxes and state disability insurance within the definition of "income" in interpeting and applying that term as used in Section 602(a)(7)(A) of Title 42 of the U.S.C. further, third-party defendant Richard J. Schweiker is permanently enjoined from responding to defts' compliance with this order by terminating federal matching funds contributed to California's AFDC Program. TEH
Aug 6	117	Defendants Woods & Dept. of Social Services' points and authorities in support of motion for reconsideration and stay (unsolicited).
July 29*	118	MINUTES: (CR/not reported) Status report held. TEH
Aug 10	119	Defendants' application for order shortening time.
	120	—motion to reconsider or stay decision of 7-29-82
	121	—brief in support of motion to reconsider.
	122	—supplemental authority.
	123	—affidavit of Linda S. McMahon
Aug 11	124	ORDER SHORTENING TIME: defts' motion for reconsideration and motion for stay will be heard 8-31-82/9AM. WWS

Aug 12	125	Plaintiffs' declaration of Mark N. Aaronson.
	126	ORDER TO SHOW CAUSE: re contempt—defts to appear 8-31-82/9AM.
Aug 16	127	Plaintiffs' proof of service as to #'s 125 & 126—dated 8-13-82
Aug 18	128	Plaintiffs' memo in support of adjudication of Civil Contempt. Received: proposed order and adjudiation of contempt.
Aug 24	129	Defendant Mary Ann Graves' memo of points and authorities in opposition to order to show cause re contempt on behalf of Mary Ann Graves.
	130	Defendants Woods and Dept. of Social Services' memo of points and authorities in opposition to order to show cause re contempt.
	131	—declaration of Charlton G. Holland. Received:proposed order re contempt.
	132	Plaintiffs' opposition to motion for reconsideration and stay. Received: proposed order denying reconsideration and a stay pending appeal.
Aug 30	133	Defendant Mary Ann Graves' supplemental declaration in opposition to order to show cause re contempt.
Aug 31	134	MINUTES: (CR? W.Harris) Pltf's motion for Civil Contempt—ordered submitted. Deft's motions to reconsider decision of 7-29-82 and to stay decision of 7-29-82—ordered submitted. TEH
Sep 21	135	Defendants' notice of APPEAL. Fees Paid. USCA#82-4552
Sep 87	136	Third Party deft. U.S.'s NOTICE OF APPEAL. No fee required. 82-4566
Sep 28	137	Defendants Graves and Dept. of Finance's NOTICE OF APPEAL. Fees Not paid. Docket Fee request form mailed. 82-4567 —copy of #'s 136 & 137 mailed to parties and USCA.
	138	Plaintiffs' response to notices of appeal.

Oct 1	139	State defendants' reply to pltfs' response to notices of appeal.
Oct 6	140	ORDER: that defts' motion for reconsideration of the Court's order and opinion of 7-29-82 and defts' motion in the alternative for a stay pending appeal are both denied. Pltf's motion for civil contempt is denied. TEH
Oct 14	141	Defendants Woods,McKinsey and the State Dept. of Social Services' NOTICE OF APPEAL as to #140. Fees Paid. 82-4599
Oct 15		—copies mailed to all counsel and USCA. Clerk.
	142	ORDER: that defts are barred from recouping as "overpayments" aid amounts restored to AFDC recipients who received defective notices of action. TEH
Oct 18	143	Third Party defendant Schweiker's NOTICE OF APPEAL as to order of 10-6-82. (82-4566) —copies mailed to USCA and Parties. Clerk.
Oct 19	144	Third Party defendant Schweiker's NOTICE OF APPEAL as to order of 10-15-82. (82-4566) (AMENDED NOTICE OF APPEAL OF 143.) —Copies mailed to parties and USCA. Clerk.
	145	Third Party defendant Schweiker's designation of reporter's transcript.
Oct 21	146	*NOTICE OF APPEAL* by defendants. Fee paid. USCA #82-4616. Copies to parties of record. (Re 10-15-82 order #142).
Oct 26	147	Appellant's designation of no reporter's transcripts on appeals 10/14/82, 9/21/82, 9/21/82. (82-4616, 82-4599, 82-4522)
Nov 8		Mailed Certificate of Record to counsel, & copies of docket, 82-4616, 82-4599, 82-4522.

MEMORANDUM OF DECEMBER 20, 1940 (EXHIBIT D TO PLAINTIFFS MEMORANDUM FOR SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

October 20, 1940

OFFICE OF THE BOARD

TO: Miss Mesy
Mr. Falk
Mr. Stern
Mr. Tate
Mr. Wilbert
Miss Eagls
Miss Bessen
—Mrs. Franklin

FROM: Leana V. MacKinnen,
Acting Secretary to the Board

At the meeting of the Board on December 17, 1940, the following action occurred:

"The Board considered the memorandum from the Bureau of Public Assistance dated December 16, 1940, 'Interpretation of 1939 Amendments to the Social Security Act in Relations to the Consideration of Increase and Resources in the Determination of Need (Document No. 3350-h). The Board concurred in the Bureau recommendations after making a minor revision, and adopted the following policy statement:

> Effective July 1, 1941, State plans for old-age assistance, aid to the blind, and aid to dependent children must provide that 'the state agency shall, in determining need, take into consideration any other income and resources' of an individual applying for one of these forms of assistance (in accordance with the amendments to Titles I, S-2(a), IV, S-402(a), and X, S-1002(a). Furthermore, under the several titles assistance is now defined as money payments to specified individuals who are 'needy.'

The purpose of these amendments is to secure that the State agency shall be in a position to give consideration to all relevant facts necessary to an equitable determination of need and amount of assistance. In order to do this, the authority of the State agency must not be limited by legislative provisions that direct the agency to disregard income or resources whether in cash or in kind, in determing the need of applicants for public asistance. Public assistance is intended to supplement rather than replace any available or continuing income and resources. The lack of resources or income to meet requirements thus because the determining factor in the establishment of need.

These amendments are not intended to prohibit States from specifying kinds and amounts of income or property ownership as affecting eligibility status; but the income or property itself must be taken into consideration in determining the degree of need of the applicant not thus excluded. Such restrictions or limitations are not recommended since they operate to establish a presumption of need in favor of applicants who may not in fact be in need while also excluding others who may be needy without allowing a full consideration of their requirements.

The single State agency responsible for the administration or supervision of any or all of the programs of public assistance under Titles I, IV, and X of the Social Security Act, must be clothed with ample legislative authority to establish by rule and regulation basic policies and procedures which permit consideration of all income and resources in the determination of need. All such policies and procedures shall be binding upon the local administrative units.

The policies and procedures adopted by the State agency shall be consistent with the following criteria for the consideration of income and resources in the determination of need:

(a) The income or resource shall actually exist. Attributing a definite amount of income to sources or to kind of property that produce either no income or less than the amount attributed to them is fictitious and such an imputed amount cannot be considered as an actual resource.

(b) The income or resource shall be available to the applicant. To be regarded as available, an income or resource must be actually on hand or ready for use when it is needed. Consideration does not mean attributing a resources to sources from which income, contributions, maintenance, or support are not in fact available and forthcoming. Nor does it mean including as available for conversion in cash, ownership in real and personal property that is already meeting established requirements of the needy person or family.

(c) The income or resource shall have some appreciable significance in meeting the requirements of the applicant. The amendments are not intended to require State agencies to bring inconsequential resources under scrutiny in establishing need, such as those resulting from casual earnings, small and unpredictable gifts of indeterminate value, or past incomes that will not continue in the future.

(d) The income or resource shall be considered from the standpoint of its conservation and its maximum utilization in the interest of the welfare of the applicant. The effect of the resource on need should be taken into full consideration both in regard to the requirements that it provides on the one hand, and the expenses that are associated with the applicant's obtaining, conserving, or utilizing it on the other."

/s/ _____
LEANA V. MACKINNEN

In ff
Copied fvs
(See Board action 1-21-41
1-24-41
2-4-41

This Bd. action is basis for letter Payroll to State agencies dated 12-20.

BUREAU OF PUBLIC ASSISTANCE PLAN OF OPERATION DATED MAY 22, 1942 (EXHIBIT E TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

Bureau of Public Assistance
State of Administration, Part II
Plan of Operation

The Social Security Act provides for the furnishing of financial assistance to "needy" individuals who are otherwise eligible. The act left the meaning of need and what constitutes the determination of need largely to the discretion of the various States. This discretion was limited somewhat by the 1939 amendments to the act which provide that THE STATE AGENCY SHALL, IN DETERMINING NEED, TAKE INTO CONSIDERATION ANY OTHER INCOME AND RESOURCES of an individual aplying for assistance under these titles of the act. The Executive Director of the Social Security Board under date of February 11, 1941, sent a letter to the State agencies notifying them of the effective date of the amendment, (which was July 1, 1941) and of the necessity for each agency prior to that date to submit and obtain approval of plan material evidencing compliance with the provisions of the amendments. This letter also contained the Board's interpretation of these amendments and recommended criteria for formulating policies and procedures for the consideration of all income and resources in determining need, as given under the following three headings. Subsequent interpretations of the amendments were issued later and are reproduced on pages 3 and 4 of this section.

Purpose of the 1939 Amendments Affecting Need

The purpose of these amendments is to assure that the State agency shall give consideration to all relevant facts necessary to an equitable determination of need and amount of assistance. In order to do this, the authority of the State agency must not be limited by legislative provisions that require the agency to disregard income or re-

sources whether in cash or in kind, in determining the need of applicants for public assistance. Public assistance is intended to supplement rather than replace any available or continuing income and resources. The lack of resources or income to meet requirements thus becomes the determining factor in the establishment of need.

These amendments are not intended to prohibit States from specifying kinds and amounts of income or property ownership as affecting eligibility status; but the income or property itself must be taken into consideration in determining the degree of need of the applicant not thus excluded. (Such restrictions or limitations are not recommended since they operate to exclude applicants who may be needy without allowing full consideration of their requirements, while also operating to establish a presumption of need in favor of applicants who may not in fact be in need.)

Authority of the State Agency to Give Effect to the Amendments

The single State agency responsible for the administration or supervision of any or all of the programs of public assistance under titles I, IV, and X of the Social Security Act, must be clothed with ample legislative authority to establish by rule and regulation basic policies and procedures which permit consideration of all income and resources in the determination of need. All such policies and procedures shall be binding upon the local administrative units.

Recommended Criteria

Since these amendments may be restrictive of the State's discretion in determining need, it was suggested that the State agencies might consider and adopt the following criteria in the formulation of policies and procedures for the consideration of all income and resources. The use of such criteria should result in a more liberal and a more equitable treatment of needy individuals. The application of these criteria is not required, but the Board recommends their adoption as representing sound principles of public welfare administration:

1. Any income when considered in the determination of need should be real and not fictitious. Therefore, income should not be attributed to sources and kinds of property that produce no income or that are not meeting a requirement of the applicant. Neither should income be attributed in excess of the income actually produced or in excess of the benefit derived. In either case, such fictitious income at best complicates the process of determining need and in most instances works an injustice and hardship upon the applicant.
2. The income or resource should be available to the applicant. To be regarded as available, an income or resource should be actually on hand or ready for use when it is needed. Consideration does not mean attributing a resource to sources from which income, contributions, maintenance, or support are not in fact available and forthcoming. Nor does it mean including as available for conversion to cash, ownership in real and personal property that is already meeting established requirements of the needy person or family.
3. The income or resource should have some appreciable significance in meeting the requirements of the applicant. Although specific exemption of income or resources is not permitted by the amendments, it is not intended that State agencies shall, in the determination of need, be required to bring under scrutiny inconsequential resources such as those resulting from casual earnings and small and unpredictable gifts of indeterminate value. Such resources and past income that will not continue in the future frequently do not affect need for the period for which payment is made and therefore should not reduce payments made for such periods.
4. The income or resource should be considered from the standpoint of its conservation and its maximum utilization in the interest of the welfare of the applicant. The effect of the resource on need should be taken into full consideration both in regard to the requirements that it meets on the one hand, and the expenses that are associated with the applicant's obtaining, conserving, or utilizing it on the other.

STATE LETTER NO. 4, DATED APRIL 30, 1942 (EXHIBIT F TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

FEDERAL SECURITY AGENCY
SOCIAL SECURITY BOARD
WASHINGTON, D.C.
April 30, 1942

OFFICE OF THE EXECUTIVE DIRECTOR

State Letter No. 4
Bureau of Public Assistance

TO STATE AGENCIES
PUBLIC ASSISTANCE PLANS

Subject: Facilitating Employment of Assistance Recipients Through Means of Sound Determination of Need

Inquiries coming to the Social Security Board from time to time indicate that State agencies desire to encourage recipients of public assistance to seek employment,—insofar as they are capable of working,—but feel that the acceptance of employment would make present recipients ineligible for further assistance payments under the State laws and the public assistance titles of the Federal Social Security Act. Or, if the agencies are not laboring under this misapprehension, the recipients themselves may fear that if they should accept work in agriculture or elsewhere, and it developed that they could not earn enough to support themselves, they could not expect supplementary payments from the public assistance agency and it would be difficult to get back on the public assistance rolls. So the result would be that they could be worse off because they accepted employment. This letter is being sent to all State agencies to explain the position of the Social Security board with reference to this matter.

The Board has always recommended that a determination with reference to the existence of need and the amount of assistance needed be based on the actual circumstances of each individual recipient. Under such a policy, persons who

work but do not earn enough to support themselves may still be found in need of assistance. Also it should be recognized that when a person is working there may be additional needs which must be met such as additional clothing, transportation, food and the like. This would merely be applying ordinary good practice to these special situations.

It has sometimes been proposed that public assistance payments should not be lowered at all because of earnings which a person may have from agriculture or other specified occupations, or because of specified forms of income. It is clear that such a policy would prevent a proper consideration of available resources as required by the Social Security Act,—and would lead to the making of assistance payments without adequate reference to individual requirements. It is equally clear that full consideration cannot be given to individual circumstances if a flat sum is attributed to increased requirements of all employed persons. However, if people are encouraged to seek employment and assured that changes in needs resulting from the fact of employment will be recognized and assistance payments continued if necessary; and if they are likewise assured that in case they are unable to retain the job they will be returned to the assistance rolls without delay, the objective in view can be attained without violating any provision of 11 or any principle of good public assistance administration.

The Social Security Board, therefore, recommends that the State agencies adopt the necessary policies to permit supplementation of earnings in those cases where earnings may not be sufficient to meet existing needs, and promptly to restore assistance to persons whose payments are suspended because of employment, when need again arises because employment ceases.

In thus advising liberality, the Board recommends that if the reapplication interview indicates that the individual because of termination of his employment is again in need of substantially the same assistance as he required before, he may be reinstated immediately for the same amount. The agency would be expected to proceed with whatsoever additional investigation is consistent with the approved State plan and to adjust the subsequent payments in accordance

with the need as determined. Such adjustments in amount of payment as would be found necessary to meet the applicant's need in his new circumstances should ordinarily be made within the quarter in reference to which Federal matching is requested.

Sincerely,

/s/

OSCAR M. POWELL
Executive Director

STATE LETTER NO. 291, DATED MARCH 11, 1967 (EXHIBIT G) ATTACHED TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

DEPARTMENT OF
HEALTH, EDUCATION, AND WELFARE
SOCIAL SECURITY ADMINISTRATION
WASHINGTON D.C.

March 11, 1967

State Letter No. 291

TO STATE AGENCIES ADMINISTERING APPROVED PUBLIC ASSISTANCE PLANS

Subject: Need—Specific Applications—Income and Resources

This Letter transmits Handbook IV-3140, "Specific Applications—Income and Resources," as an addition to Handbook IV-3000, "Need." This release is part of our continuing work in furthering the currency of the Handbook of Public Assistance Administration, and incorporates additional interpretation growing out of applications of Bureau policy to specific State situations. They are in areas of common concern and may be pertinent in many States. The following items are included:

1. "Employment Expenses"
2. "Income of Children Eligible for Aid to Dependent Children"—(Previously transmitted by State Letter No. 270)
3. "Home Produce for Family Consumption"
4. "Farm Income—Limitation on Use of OASI Methods in Public Assistance"

Sincerely yours,

/s/

Jay L. Roney
Director

Enclosure

Instructions for Insertion in Handbook

Insert attached Handbook pages IV-3140 immediately following IV-3132.

2160. *Specific Applications—Income and Resources*

1. *Employment Expenses*

A State public assistance agency may establish a reasonable minimum money amount to represent the combined additional cost of three items—food, clothing, and personal incidentals—for all employed persons. The State plan may provide that other items of work expense will be allowed when there is a determination that such expenses do, in fact, exist in the individual case. On the basis of such a finding in fact of the existence of other expenses related to employment, money amounts for such expenses may be added above the minimum flat amount, provided no duplication of items exists. This method is acceptable, whether the items of work expenses are included in a State's standard for requirements, or whether the agency uses the method in arriving at net income in determining resources.

The purpose of this interpretation is to help States simplify administration by eliminating the need for individual case determinations of certain common needs of employed persons. Increased food necessitated by increased activity along with increased clothing and grooming necessitated in holding a job may be standardized and accepted as common needs of all employed persons. The State agency should be in a position to support the reasonableness of any minimum money amount established for these items within the general framework of its assistance standards and its knowledge and experience with respect to work expenses of recipients.

2. *Income of Children Eligible for Aid to Dependent Children*

Interpretations under title IV of the Social Security Act governing children's income must apply to all income regardless of source, not only to the earnings of children eligible for aid to dependent chil-

dren. This does not mean that the expenses related to earned income are not recognized. On the contrary, in arriving at the child's net income from his employment, adequate provision may be made for all expenses entailed in producing that income. For working children such provision might include costs of additional food, clothing and personal upkeep, and of other items such as transportation, purchase or repair of a bicycle (for use by a child delivering newspapers, etc.), participating in the "snack break," contributing to collections for employee benefits, etc., as are found to be necessary in connection with holding the job. Cost of such items * * * * *.

Transmitted by State Letter No. 291

EXCERPTS FROM PUBLIC ASSISTANCE REPORT NO. 43, DATED MARCH, 1961

STATE METHODS FOR DETERMINING NEED IN THE AID TO DEPENDENT CHILDREN PROGRAM

By Gladys O. White
Home Economics Consultant

U.S. DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
Public Assistance Report No. 43
Social Security Administration
Bureau of Public Assistance
March 1961

FOREWORD

Ever since a 1946 meeting of the Bureau of Public Assistance and all State administrators of public assistance, the Bureau has been continually placing special emphasis on helping the States to develop statewide standards based on requirements of the Social Security Act. These requirements, taken in their entirety, spell out the intent of the act that needy individuals shall receive equal treatment under the law within a State.

There can be no question that, over the years, great progress has been made by the States. This progress is reflected in their plan material governing the process of need determination.

Analysis of progress usually facilitates further improvement. Therefore, in 1959, the Bureau of Public Assistance undertook a project of organizing and analyzing information about the methods used by the States in determining need and the amount of the money payment in their aid to dependent children programs. The project, covering the period May-July 1959, was limited to aid to dependent children primarily because it has become the largest of the public assistance programs.

Information on other areas of State administration during the same period has been gathered; some of it has been published. It therefore seemed particularly valuable to bring together information on State need determination.

The Bureau is publishing this report on the project as part of its plan to issue information "significant in indicating adequacy of appropriations and assistance payments in each State," as recommended in the *Report of the Advisory Council on Public Assistance*, 1950.

The report has been written by Miss Gladys White, Home Economist, who conducted the project. It describes the way the State's standard and its income policies govern the important step of need determination in the eligibility process. Obviously, there is still need for improvement. Some of the variations reported by Miss White may lead some readers to question whether these variations advance the common objectives of all those concerned with adminis-

tering this most important aspect of the public assistance programs.

In considering the report, it seems timely to re-emphasize the goals of public assistance administration: Our efforts are directed toward bringing about greater simplicity for the worker, greater predictability for the client, and greater accountability by the agency for its actions.

Specify conditions under which employment was assumed to be available; however, one may well doubt the practicality of workers operating under the conditions set out in the policy. There can be no doubt that deprivation must result in any family where the policy was applied, i.e., amounts shown as income from wages when the facts certified to absence of such income.

Only two of these seven States provided a State-established cost figure for the adult's additional cost of food, clothing, and personal incidentals to be deducted from the gross assumed income. Such expenses incident to employment seem properly assumed, if wages are also assumed. While these States did provide a list of items whose costs were to be deducted in arriving at net income, in some of these States the list was not as inclusive as those provided in other States which did not assume income from potential earnings.

There were six States' plans that contained a variety of policies for taking assumed income into account and computing its amount:

Florida	North Carolina	New Mexico
Michigan	North Dakota	Utah

In one State plan, the method was given for computing the income to be assumed as the contribution to the ADC group from an employed child, age 18 or over: "50 percent of the net income(of the working child) or $75 per month, whichever is smaller." Another State plan provided that income was assumed from rental property and income from a reserve asset transferred as a gift, if it was income-producing prior to transfer. In another State, "room and board from unrelated persons" was assumed as income available to the ADC group.

Some States did make provision for "hardship"; modification was made in policies which would otherwise take into account amounts that rested on the assumption of contributions from relatives.

In States where income was assumed in the amount of the support ordered by the court, the mother's only alternative was to go back into court to try to get the order changed to the amount actually being paid. There are many reasons why this would be difficult for the mother and burdensome for the court. There is some question whether it is administratively feasible for many local agencies to keep as close contact as would be necessary to work helpfully under such a State policy.

Determination of Net Income from Employment—for Mothers and for Employed Children

Policies were examined relative to determination of net income to see whether States had a specific policy related to the net income from the mothers' employment and from children's employment, or whether one general policy was used for determination of the net income for all employed persons, i.e., not specifically identified for the mother or the children.

The term "gross income," as used by States in these policies, refers to "take-home pay" after payroll deductions for union dues, income tax, retirement, and other such items have been made. "Net income" refers to amounts available after other employment costs have been recognized.

A combination of four different methods was used by some States in determination of net income from employment, while some States used only one or more of these methods. In order of their specific direction to staff, the methods were:

(1) A State-established cost figure for additional food, clothing, and personal incidentals to be deducted from gross income in arriving at net income.
(2) Costs of other listed items to be deducted from gross income if the individual had such costs.
(3) Costs of listed items plus any "other expenses" incidental to earning income to be deducted.

(4) A general statement that "expenses incident to earning income" to be deducted.

Costs of Listed Items to be Deducted from Gross Income in Arriving at Net Income from Employment

Of the 53 States, 48 gave a list of items whose costs were to be deducted from gross income in arriving at net income from employment. (Ohio showed these items as requirements, as did Hawaii and Idaho, which listed these items under special needs). Of these 48 States, 5—Alabama, Alaska, Arkansas, Connecticut, New Jersey—did not specifically identify the list as related to arriving at net income from the mother's employment. It was stated as a policy governing the determination of net income in general, which, of course, would also cover the net income from the mother's employment.

The items most frequently listed by States as deductable employment costs from gross income in arriving at net income were: transportation (38 States), special tools and equipment (23 States), uniforms and/or other special clothing (22 States), cost of child care (21 States), lunches (15 States), and collection for employee benefits (7 States).

The five State plans that did not list items but contained a general statement that all expenses were to be deducted in arriving at net income from employment were Colorado, Indiana, North Dakota, Vermont, and West Virginia.

State-Established Cost Figures for Additional Costs of Food, Clothing, and Personal Incidentals

Sixteen States provided a State-established cost figure for additional costs of food, clothing, and personal incidentals to be deducted from gross income from employment:

California	Louisiana	Pennsylvania
Connecticut[15]	Maine[16]	Texas[17]
Delaware	Michigan	Virgin Islands[18]
District of Columbia[14]	Montana	Wisconsin
Illinois	New Hampshire	
Kentucky[16]	North Carolina	

These States used their State-established cost figures for additional employment costs for food, clothing, and per-

sonal incidentals to be deducted from gross income in arriving at net income for a mother or in relation to the net income policy in general.

Twelve additional States had this policy specifically for employed children:

Arizona	New York	Vermont
Iowa	North Dakota	Washington
Minnesota	Rhode Island	West Virginia
Nebraska	Utah	Wyoming

Considering the 16 State plans that provide this State-established cost figure (for additional food, clothing, and personal incidentals) which related to all net income, plus the 12 that were specific for children, there were, in all, 28 State plans that did take into account this additional cost in arriving at the net income for children from their employment.

The following 25 States did not provide a State-established additional cost figure for food, clothing, and personal incidentals of employed individuals:

Alabama	Indiana	Ohio
Alaska	Kansas	Oklahoma
Arkansas	Maryland	Oregon
Colorado	Massachusetts	Puerto Rico
Florida	Missouri	South Carolina
Georgia	Mississippi	South Dakota
Hawaii	Nevada	Tennessee
Idaho	New Mexico	Virginia
	New Jersey	

[a] Cost figure for personal incidentals only.
[b] Varies by age.
[c] Clothing and personal incidentals only.
[d] Clothing and personal incidentals.
[e] Clothing only, varied by three fixed amounts for three types of work.
[f] Amount not fixed.

SECTION 3140 OF HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION DATED JUNE 21, 1962 (EXHIBIT H TO PLAINTIFFS MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

(Handbook of Public Assistance Administration

Part IV
3100-3199

Eligibility and Payments to Individuals Need

3140. Specific Applications—Income and Resources

1. *Employment Expenses*

A State public assistance agency may establish a reasonable minimum money amount to represent the combined additional cost of three items—food, clothing, and personal incidentals—for all employed persons. The state plan may provide that other items of work expense will be allowed when there is a determination that such expenses do, in fact, exist in the individual case. On the basis of such a finding in fact of the existence of other expenses related to employment, money amounts for such expenses may be added above the minimum flat amount, provided no duplication of items exists. This method is acceptable, whether the items of work expense are included in a State's standard for requirements, or whether the agency uses the method in arriving at net income in determining resources.

The purpose of this interpretation is to help States simplify administration by eliminating the need for individual case determinations of certain common needs of employed persons. Increased food necessitated by increased activity along with increased clothing and grooming necessitated in holding a job may be standardized and accepted as common needs of all employed persons. The State agency should be in a position to support the reasonableness of any minimum money amount established for these items within the general framework of its assistance standards

and its knowledge and experience with respect to work expenses and recipients.

2. *Income of Aid to Dependent Children Families*

Interpretation under title IV of the Social Security Act governing family income must apply to all income regardless of source, not only to the earnings of the ADC family.

In arriving at any family member's net income from his employment, adequate provision should be made for all expenses entailed in producing that income. For working family members such provisions might include cost of additional food, clothing and personal upkeep, and of other items such as transportation, care of child(ren) at home or in day-care facilities, participating in the "snack break," contributing to collections for employee benefits, etc., as are found to be necessary in connection with holding the job. Cost of such items should be consistent with reasonable and realistic employment expenses.

Transmitted by State Letter No. 5

SECTION 3140 OF HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION, DATED APRIL 22, 1964 (EXHIBIT I ATTACHED TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

Handbook of Public Assistance Administration

Part IV 3100-3199

Eligibility, Assistance, and Service Need 4/22/64

3140. *Specific Applications—Income and Resources*

1. *Employment Expenses*

Sections 2(a)(10), 402(a)(7), 1002(a)(8), 1402(a)(8), and 1602(a)(14) of the Social Security Act require that, in considering income and resources, the State agency shall take into consideration any expenses that are reasonably attributable to the earning of any such income. These requirements became effective July 1, 1962, with the exception of title XVI, which is effective with the approval of the State plan. For similar provision applicable in the Community Work and Training Program under title IV, see IV-3402.21 and IV-3452.

Interpretation

The provision for the consideration of expenses of earning income was included in the law to insure that all States will recognize work expenses in determining net income. Also, if work expenses are not considered by a State agency in its plan material, it has the effect of failing to provide an incentive for working since that portion of the family income spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter.

Increased food necessitated by greater activity, along with the additional clothing and its care, and better grooming necessitated in holding a job, may be standardized as accepted, common needs of all employed persons. Therefore, to simplify administration, a State public assistance agency may establish a reasonable money amount to represent the combined additional cost of these three

items—food, clothing, and personal incidentals—for all employed persons. The State agency should be in a position to support the reasonableness of any money amount established for these items within the general framework of its assistance standards and its knowledge and experience with respect to work expenses of recipients. This method is acceptable, whether the items of work expenses are included in a State's standard for requirements, or whether the agency uses the method of deduction of work expenses from earned income in arriving at the individual's net income from his employment.

Items of work expenses must be allowed when there is determination that such expenses do, in fact, exist in the individual case. On the basis of a finding of the existence of expenses related to employment, money amounts for such expenses must be added to the individual's needs or deducted from his earned income in such a way as to assure that no duplication of items will exist.

In addition to the increased cost of food, and additional amounts for clothing, care of clothing and personal incidentals, other expenses reasonably attributable to earning income might include:

Special safety or protective clothing items or uniforms and the cost of cleaning or laundering of these special items.

Participation in the "snack break" where it is the custom for that employment.

Transportation to and from work and transportation on job if not reimbursed by the employer.

Contributions to collections for employee benefits, etc., as are found to be necessary in connection with holding the job.

Tools and license required for the job.

Dues to union, business organizations, employee clubs, or similar assessments.

Educational expenses related to employment, including any necessary publications.

Care of child(ren) at home or in day-care facilities, cost of more expensive ready prepared foods for the family when the homemaker works.

Special safety devices needed by handicapped people not furnished by the employer.

Requirement for State Plans

Effective July 1, 1968, a State plan under titles I, IV, X, and XIV, and, effective on approval, a State plan under title XVI, must provide that, in determining need, any expenses reasonably attributable to the earning of income will be taken into consideration.

2. *Income of Aid to Dependent Children Families*

Interpretations under title IV of the Social Security Act governing consideration of family income against current needs must apply to all income regardless of source, not only to the earnings of the AFDC family.

In the "consideration," under title IV of net income of an eligible AFDC family, the following options, applicable to any income regardless of source, are available to States in relation to current needs.

a. Any AFDC child who has income of his own sufficient to cover his needs may be removed from the assistance plan and from the case count. The Federal policy that then applies is that all income he voluntarily makes available to the recipient family must be taken into consideration in determining their need.

b. Special needs may be included in the Statewide standard for all children with such needs—whether or not the child or any member of his family has income. Among such items may be the following: medical care, school expenses, cost of special courses of training, participation in school band or orchestra, participation in school athletic * * * * *

SECTION 3342 OF HANDBOOK OF PUBLIC ASSISTANCE ADMINISTRATION DATED MARCH 28, 1963
(ATTACHMENT #1 TO GOVERNMENT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT)

Handbook of Public Assistance Administration

Part IV.
3100-3199

Eligibility and Payments to Individuals
Needs 3170-83

3160. *Aid to the Blind—Disregard of Income and Resources*

3162. *Provisions of the Act*
See IV-3110

3162. *Interpretation*

1. *Earned Income*

In 1960, by amendment, the States were given the option to exempt the first $50 per month of earned income of the blind individual who earned it, in the determination of his need and the amount of his payment under title X. This exemption became mandatory on *July* 1, 1962. A 1962 amendment permitted the States, "up to *June* 30, 1964 to disregard the earned income of the recipient of aid to the blind in determining the need of any other individual under the same or any other State public assistance plans approved under the Social Security Act." After *June* 30, 1964 this provision became mandatory.

An amendment in 1960 changed the provisions by permitting States the option, until *July* 1, 1962, of either disregarding the first $10 per month of earned income or disregarding the first $60 per month plus one-half the earned income in excess of that figure. On and after *July* 1, 1962 the latter provision became mandatory on the States.

The term "disregard" with reference to earned income of a needy blind individual is interpreted to mean its exemption in determining current need and the amount of the assistance payment.

"Earned income" is defined as follows:

a. "Is encompasses income in cash or in kind earned by a needy blind individual through the receipt of wages, salary, commissions, or profit

from activities in which he is engaged as a self-employed individual or as an employee. Such earned income may be derived from his own employment, such as business enterprise, or farming; or derived from wages or salary received as an employee. It includes earnings over a period of time for which settlement is made at one given time, as in the instance of sale of farm crops, livestock, or poultry.

b. With reference to commissions, wages, or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work. However, expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers, are to be deducted from the gross remuneration, if furnished by the employee.

c. In the instance of self-employment, the term "earned income" means the total profit from business enterprise, farming, etc., resulting from a comparison of the gross income received with the "business expenses," i.e., total cost of the production of the income. Personal expenses, such as income-tax payments, lunches, and transportation to and from work, are not classified as business expenses.

The above definition is interpreted as excluding the following from "earned income":

Returns from capital investment with respect to which the individual is not himself actively engaged, as in a business (*for example, under most circumstances, dividends and interest would be excluded from "earned income"*);

Benefits (not in the nature of wages, salary, or profit) accruing as compensation, or reward for service, or as compensation for lack of employment; (*for example*, pensions and benefits, such a United Mine Workers' benefits or Veterans' benefits).

With regard to the degree of activity, earned income is income produced as a result of the performance of services with a blind recipient; in other words, income which the blind individual earns by his own efforts, including managerial responsibilities, would be properly classified as earned income. Under this interpretation, income received by a blind individual as a result of capital investment in real estate and substantial effort on his own part in managing or giving other specific services in relation to that investment, could be termed earned income. This would be true even when the income is derived in part as a result of services performed by others if substantial personal services on the part of the blind individual are involved and the income belongs to him. To illustrate, income to the blind individual from projects carried on jointly with others, such as the operation of a rooming house or from home production enterprises, is classified as earned income. Conversely, in the instance of capital investment wherein the individual carries no specific responsibility, such as where rental properties are in the hands of rental agencies and the check is forwarded to the recipient, the income would not be classified as earned income.

In cases of lump-sum payment for services rendered over a period of more than 1 month, the provision for disregarding earned income relates to the period in which the income is earned, rather than when it is paid.

Reserves accumulated from earnings are given no different treatment than reserves accumulated from any other source.

On and after July 1, 1962, for those blind applicants or recipients whose earned income is in excess of $85 a month, and for whom one-half of the excess must also be disregarded, it is necessary for States to use the following method in determining the total amount to be disregarded:

(1) Deduct non-personal work expenses from gross earnings.

(2) Disregard the first $85 per month and one-half of the excess above $85.

(3) Deduct personal work expenses recognized in the State plan.

(4) Take any remainder into consideration in the assistance plan (except, effective July 1, 1963, as provided in item 2 below).

A specified method is prescribed in these cases as a different amount of exemption results depending on the method used. In those cases in which earned income is $85 or less, it makes no difference in the result if both nonpersonnel and personal work expenses are lumped together and deducted from gross income to arrive at the amount to be disregarded.

2. *Other Income and Resources*

The 1962 amendments added to the disregarding of earned income, the further provision, effective July 1, 1963, that the State agency shall disregard for a period not in excess of twelve months, such additional amounts of other income and resources, in the case of an individual who has a plan for achieving self-support approved by the State agency, as may be necessary for the fulfillment of such plan.

A further amendment in 1964 (Public Law 88-650), while keeping the foregoing mandatory provision, offered an option to States, effective October 13, 1964, in the following words: ... "the State agency ... shall, for a period not in excess of twelve months, and may, for a period not in excess of thirty-six months, disregard such additional amounts of other income and resources, in the case of an individual who has a plan for achieving self-suport approved by the State agency, as may be necessary for the fulfillment of such plan,..."

These provisions apply to earned income in excess of that disregarded in item 1 above, and to any unearned income and other resources such as property of any kind, in such amounts as may be necessary to the fulfillment of the blind individual's plan for achieving self-support, if that individual's plan is

approved by the State agency. These provisions are mandatory for a twelve-month period and optional for an additional period of up to twenty-four months, making a total maximum period of thirty-six months.

The plan may be made in cooperation with an agency such as the vocational rehabilitation or welfare agency, but it must be accepted and presented by the blind individual as his own plan for which he wishes to use his resources.

3163. *Requirements for State Plans*

1. A State plan for aid to the blind must provide:

a. That the State agency, in determining the need of an applicant or recipient for aid to the blind, will disregard the first $85 per month of earned income plus one-half of earned income in excess of $85 per month.

DEPARTMENT OF HEALTH, EDUCATION, & WELFARE MEMORANDUM OF FEBRUARY 1, 1972 (ATTACHMENT #2 TO GOVERNMENT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT)

DEPARTMENT OF HEALTH, EDUCATION, AND WELFARE
SOCIAL AND REHABILITATION SERVICE
Assistance Payments Administration

February 1, 1972

MEMORANDUM

Mr. Costa
Mr. Hurley
Mrs. Hoadley
Mr. Cohen
Mr. Shapiro
Mrs. DeMarco
Miss Stewart

FROM: Chief, Assistance Standards Branch

SUBJECT: Expenses Reasonably Attributable to the Earning of Income

1. In preparation for the meeting on expenses reasonably attributable to the earning of income on Wednesday, February 2 at 2:30 p.m. in Mr. Costa's office, we are sending you herewith several items that you may wish to review in advance. These are:

a. *Selected Handbook Sections* that showing the regulations pertaining to expenses of employment from 1952.

b. *Summary of State Agency Policy on Expenses Reasonably Attributable to the Earning of Income—AFDC* gives basic information on items recognized as expenses of employment in each State.

c. *Analysis of Items Recognized as Expenses Reasonably Attributable to the Earning of Income* gives the same basic information as the *Summary*, except by item rather than by State.

2. An additional comment must be that it is literally impossible to know, from manual material available in Central Office, what States are actually doing with regard to expenses of employment.

/s/ Gertrude Lutwin
GERTRUDE LUTWIN

Attachments

EXHIBIT A

HISTORICAL SUMMARY OF EXPENSES RELATED TO EMPLOYMENT AS IT PERTAINS TO TITLES I, X, XIV OR PART A OF TITLE IV

One of the first State Letters[1] in the Technical Services Manual Series was centered on the employment of public assistance recipients. In this letter, and others[2], State agencies were encouraged to recognize on an individual case determination, the additional needs of persons who were working. At that time, the Social Security Board considered recognition of the additional need for such items as clothing, transportation and food to "...to rely be applying ordinary good practice to special situations."

Recognition of expenses of employment on an optional basis continued until the 1950 Amendments to the Social Security Act made special provisions for the consideration of income for the blind under Title X.

The 1950 Amendment to Section 1002(a)(8) of the Social Security Act was "...to assist blind individuals in becoming useful and productive members of their communities...." and provided that earnings of up to $50 per month be disregarded. This disregard of earned income was limited to the determination of need and payment, under Title X, of the blind individual who earned it. Such income had to be considered a resource to other individuals to whom it was available, when applying for assistance in their own right under a State plan approved under Title I, IV, X, or XIV.

The 1952 Amendments to Section 1002(a)(8) altered the limitation inherent in the 1950 Amendments which made disregarded earned income of the blind a resource to other individuals to whom it was available. This amendment permitted the States, up to June 30, 1954, to disregard the earned income of the recipient of Aid to the Blind in determining the need of any other individual under the same or

[1] State Letter No. 4, April 30, 1940

[2] Assistance Section, Set No. 1: #271—5-10-42, #411—5-27-43
Bureau Circular No. 9 thru 18—12-5-40
Technical Services Manual Series, State Letters 60-139; Handbook of Public Assistance Administration, 10-25-60

any of the other State public assistance plan approved under the Social Security Act. After June 30, 1954, this requirement became mandatory.

The *Handbook of Public Assistance Administration* policy on the 1952 Amendment defined earned income:

> "With reference to commission, wages or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income tax deductions, lunches, and transportation to and from work. However, expenses of employment which are not personal, such as cost of tools, materials, special uniforms, or transportation to call on customers, are to be deducted from the gross remuneration, if furnished by the employee."

The *Handbook*[3] presented optional policy to help States simplify administration by eliminating the need for individual case determination of certain common needs of employed persons. States were encouraged to establish a reasonable minimum money amount to represent the combined additional cost of three items—food, clothing, personal incidentals for all employed persons. The optional policy provided that "The State agency should be in a position to support the reasonableness of any minimum money amount established for these items within the general framework of its assistance standards and its knowledge and experience with respect to work expenses of recipients."

With the passage of the 1962 Amendments, the Social Security Act[4] as amended, provides that the State Agency shall, in determining need for such assistance, take into consideration any other income and resources of an individual claiming assistance, as well as any expenses reasonably attributable to the earning of any such income. The amendments made consideration of any expenses that are reasonably attributable to the earning of income mandatory by law, effective July 1963 and were intended as an additional

[3] Part IV, 2140.1, 1957

[4] (Title I, Section 2(a)(10)(A), Title IV-A, Section 402(a)(7), Title X, Section 1002(a)(8), Title XIV, 1402(a)(8), Title XVI, Section 1602(a)(4))

incentive for employment to encourage efforts to achieve self-support.

In both the House Committee on Ways and Means Report[5] and the Senate Finance Committee Report[6] on HR 1060 (Public Welfare Amendments of 1962), it was stated that under existing law if "...work expenses are not considered in determining need, they have the effect of providing a disincentive to working since that portion of the family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter...." The Committees therefore added a provision in all assistance titles requiring the States to give consideration to any expenses reasonably attributable to the earning of income. The Committees believed that it was only reasonable for the State agencies to take expenses of employment fully into account.

[5] House Report No. 1414, 87th Congress, 2nd Session
[6] Senate Report No. 1589, 87th Congress, 2nd Session

EDITOR'S NOTE

PAGES 51 through 55 WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ALLOWANCES ATTRIBUTABLE TO THE EARNING OF INCOME - AFDC

APP

	Fixed Dollar Amount	No Fixed Dollar Amount - Items Recognized	Child Care
Alabama		Not identifiable from State agency plan material in central office	--
Alaska		Taxes, Social Security, retirement, union dues	X
Arizona		Flat amounts for: MPD - $12 Transportation $8 Personal Care Items $4 Extra Food away from home $12 Extra clothing and upkeep $4	Not allowed because otherwise available
Arkansas	$20 flat		X
California		Taxes and Social Security, transportation to work, lunches.	--
Colorado		Not to exceed $30 per month: MPD, union dues, transportation, special clothing, special education or training, telephone, additional food, personal needs.	--
Connecticut		Taxes, Social Security, transportation not to exceed $10 per month, retirement and union dues if mandatory, group life and hospital insurance.	X
Delaware		Union dues, transportation to work, "and all other work connected expenses"	X
District of Columbia		Taxes, Social Security, retirement, transportation, special clothing.	--
Florida		Taxes, Social Security and other compulsory deductions - not more than 7% of gross, transportation $1/day, special clothing, uniforms, tools and equipment, supplies and materials.	X
Georgia		Taxes, Social Security, retirement, union dues. In addition, $25.00 flat.	X
Hawaii		*$32.00 flat plus i.e., Federal and State Income Tax, Federal Social Security Tax, retirement, garnishment, TDI.	X
Not approved plan			

...S REASONABLY ATTRIBUTABLE TO THE EARNING OF INCOME - AFDC

	Fixed Dollar Amount	No Fixed Dollar Amount - Items Recognized	Child Care
Idaho		Mandatory payroll deductions, union dues, group insurance, tools, in addition, not to exceed $10 for transportation, clothing and lunches.	
Illinois		Mandatory payroll deductions including medical insurance, transportation, lunches - if carried 15¢/day or $3.00/mo.; if purchased 45¢/day or $9.00/mo., telephone, tools, uniforms	Considered as an item of need not expenses of employment.
Indiana		Mandatory payroll deductions, union dues, transportation, lunches, special clothing, special education or training, telephone, tools, licenses, dues to business organizations, special safety devices, $11 flat for extra food away from home and extra clothing and upkeep.	X
Iowa		Mandatory payroll deductions, union dues, transportation up to $44.00/mo. to and from work and on the job, special clothing, telephone, tools, uniforms, equipment and supplies.	X
Kansas		Mandatory payroll deductions, transportation to and from work and on the job - $60/mo. maximum, personal care items, extra clothing and clothing upkeep, lunches - 50¢/day, tools and equipment and depreciation of same, supplies, materials.	Service
Kentucky		Mandatory payroll deductions, transportation to and from work and on the job, tools, uniforms, materials.	X
Louisiana		A flat amount based on earnings plus MFD, transportation at actual cost, special education.	X
Maine		MFD and $30 flat for all other personal and non-personal expenses.	X
Maryland		Not identifiable from State agency plan material in central office.	--
Massachusetts		MFD, union dues and $11 flat per month for all other.	--
Michigan		Taxes and Social Security, retirement and $40 flat but all items must be justified.	Service

	Fixed Dollar Amount	No Fixed Dollar Amount - Items Recognized	Child Care
Minnesota		MFD, transportation to and from work and on the job, lunches, tools, uniforms, materials.	--
Mississippi		Taxes and Social Security, transportation - $12/mo. or actual, $35.00 car payment, extra clothing and upkeep - $5/mo., lunches - $7/mo.	X
Missouri		MFD, union dues, transportation to work, personal expenses, extra food away from home, extra clothing and clothing upkeep.	Not considered an expense of employment.
Montana		Taxes and Social Security, union dues, transportation, personal care items, extra food away from home, special clothing, special education and training, tools, uniforms, materials, contributions expected of people on the job, community activities arising out of employment, physical examination, chore service.	X
Nebraska		MFD, union dues, transportation to and from work, extra clothing and clothing upkeep, special clothing, tools, licenses, equipment and supplies, materials	--
Nevada		$25.00 flat and taxes and Social Security, union dues, transportation on the job, tools, uniforms, materials.	X
New Hampshire		Union dues, other employee associations and organizations, transportation to and from work and on the job, snack break, cost of more expensive ready prepared foods when housewife works, special education or training including publications, telephone, tools, uniforms, licenses, special safety devices, contributions expected of people on the job, group insurance.	X
New Jersey		MFD and $50 flat for all other expenses.	X
New Mexico		MFD, union dues, transportation to and from work and $15 flat for all other.	X
New York		Union dues, cost of tools, materials, uniforms and other special clothing required for the job, mandatory fees for licenses or permits fixed by law, Federal, State and local taxes, Social Security taxes, group insurance, lunches and transportation. Meals incident to employment: Breakfast - $.75; Lunch - $.90; Dinner - $1.30	X

REASONABLY ATTRIBUTABLE TO THE EARNING OF INCOME - AFDC

	Fixed Dollar Amount	No Fixed Dollar Amount - Items Recognized	Child Care
North Carolina		Taxes and Social Security, medical and hospital insurance, transportation to and from work.	X
North Dakota		Taxes and Social Security and $20 flat ($10 part-time)	--
Ohio		Taxes, Social Security, retirement, group medical and life insurance, union dues, transportation to and from work, on the job and to and from a day care center, tools, uniforms, materials, support payments.	X
Oklahoma		Taxes and Social Security, transportation to and from work, and a flat amount based on amount of earnings.	--
Oregon		Transportation - $25.00/mo. to work and to child care, telephone, increased allowance for food, clothing and personal incidentals based on amount of monthly earnings, union dues.	X
Pennsylvania		Mandatory payroll deductions, transportation, telephone, tools, materials.	X
Rhode Island		Mandatory payroll deductions and group insurance, union dues, transportation to and from work and on the job, $1/day to maximum of $20/mo. for extra food away from home, telephone, tools, uniforms, licenses, dues to business organizations, special safety devices, materials, legal attachment of wages.	X
South Carolina		Mandatory payroll deductions, union dues, transportation to and from work and on the job, and flat amount, tools, uniforms, licenses, dues to business organizations, special safety devices, materials.	X
South Dakota		Mandatory payroll deductions, union dues, special education or training, support payments and $20 flat for full-time employment, $10 part-time.	X
Tennessee		Taxes and Social Security, union dues, transportation to and from work and on the job, special education or training, tools, uniforms, licenses, dues to business organizations, special safety devices, materials.	X

State Policy on Expenses Reasonably Attributable to the Earning of Income - AFDC

	Fixed Dollar Amount	No Fixed Dollar Amount - Items Recognized	Child Care
Texas		A flat amount plus taxes, transportation to and from work and on the job, lunches, tools, uniforms, materials.	X
Utah		Mandatory payroll deductions, transportation to and from work and on the job, lunches, tools, uniforms, materials.	--
Vermont	$40 flat		X
Virginia		Taxes and Social Security, transportation to and from work, tools, uniforms, equipment and supplies.	Service
Washington		Mandatory payroll deductions, transportation to and from work and on the job, extra clothing: $5.70 clerical, $3.60 manual work, tools, uniforms, materials.	Service
West Virginia		Mandatory payroll deductions, pre-paid medicals, transportation to and from work and on the job, lunches (meals on the job), tools, uniforms.	X
Wisconsin		Taxes and Social Security, transportation	X
Wyoming		Mandatory payroll deductions, union dues, transportation to and from work and on the job, tools, uniforms, materials.	X

ANALYSIS OF ITEMS RECOGNIZED AS EXPENSES REASONABLY ATTRIBUTABLE TO THE EARNING OF INCOME, BY STATE AGENCY MANUAL MATERIAL AVAILABLE IN CENTRAL OFFICE—AFDC

I. *Mandatory Payroll Deductions (MPD)*

A. Flat Amount:
Arizona ($12)

B. As Paid:
Florida (not to exceed 7% of gross)
Idaho
Illinois
Indiana
Iowa
Kansas
Kentucky
Louisiana
Maine
Massachusetts
Minnesota
Missouri
Nebraska
New Jersey
New Mexico
Oregon
Pennsylvania
Rhode Island
South Dakota
Utah
Washington
West Virginia
Washington

C. Included in a total flat amount:
Arkansas ($20)
Colorado ($30)
Vermont ($40 full-time; $20 part-time)

II. *Payroll Deductons, As Specified*

A. Taxes, Social Security and Retirement
Alaska
Connecticut
District of Columbia
Georgia
Hawaii
Michigan
Ohio

B. Taxes and Social Security
California
Mississippi
Montana
Nevada
New York
North Carolina
North Dakota
Oklahoma
Tennessee
Virginia
Wisconsin

C. Taxes
Delaware
Texas

D. Group Insurance (life, medical or both)
Connecticut
Idaho
Illinois
Michigan (in a total flat amount)
New Hampshire
New York
North Carolina
Ohio
Rhode Island
West Virginia

E. Union Dues:
Alaska
Connecticut
Delaware
Georgia
Idaho
Indiana
Iowa
Massachusets
Missouri
Montana
Nebraska
Nevada
New Hampshire
New Mexico
New York
Ohio
Oregon
Rhode Island
South Dakota
Tennessee
Wyoming

F. Union Dues Included in a total flat amount:
Colorado
Michigan

G. Union Dues in addition to total flat amount:
South Carolina

III. *Flatness of Expenses of Employment*

A. Flat amount for total Expenses of Employment, excluding child care
Arkansas
Vermont

B.1. Flat amount for Expenses of Employment based on hours worked (other than full or part-time)
Arizona (specified 5 items)

B.2. Flat amount for Expenses of Employment based on amount earned
Oklahoma
Oregon

C. Flat amount in addition to items as specified.

Florida	(Social Security, taxes, union dues and other compulsory deductions—not more than 7% of gross)
Georgia	(taxes, Social Security, union dues, child care)
Hawaii	(taxes, Social Security, retirement, garnishment and TDI)
Idaho	(MPD, union dues, compulsory health insurance, tools)
Indiana	(MPD, child care, union dues, transportation, lunches, special clothing, special education or training, telephone, tools, licenses, dues to business organizations, special safety devices)
Louisiana	(MPD, child care, transportation,special education)
Maine	(MPD, and child care)
Massachusetts	(MPD and union dues)
Michigan	(taxes and Social Security, retirement, items must be justified)
Nevada	(taxes, Social Security, child care, union dues, transportation, tools, uniforms, materials)
New Jersey	(MPD and child care)
New Mexico	(MPD, child care, union dues and transportation)
North Dakota	(taxes and Social Security)
Oklahoma	(taxes and Social Security, transportation)
South Carolina	(transportation, tools, and other materials, such as uniforms, licenses, union dues, business organizations and employee clubs or other assessments of this nature, special safety devices for handicapped, expenses incident to child care, child care))
South Dakota	(child care, MPD, union dues)
Texas	(taxes, child care, transportation, lunches, tools and materials, uniforms)
Vermont	(child care, cost of sitter's meals and transportation)

IV. *Child Care*

A. Childcare provided:

Alaska
Arkansas
Delaware ($20/wk per child)
Florida ($12/wk per child; $150/mo. per sibling group)
Georgia
Hawaii
Indiana
Iowa
Kentucky
Louisiana (if not vendor)
Maine
Mississippi
Montana ("babysitting")
Nevada ($86/mo. for 1 child; maximum $150 for 4 children)
New Hampshire
New Jersey
New Mexico (specific rates given)
New York
North Carolina (if not vendor)
Ohio
Oregon
Pennsylvania
Rhode Island
South Carolina (and expenses incident to child care)
South Dakota
Tennessee
Texas
Vermont
West Virginia
Wisconsin
Wyoming

B. Uncertain as to how provided.
California
Colorado
District of Columbia
Idaho
Massachusetts
Minnesota
Nebraska
North Dakota
Oklahoma
Utah

C. Child Care provided as a service
Kansas
Michigan
Virginia
Washington

D. Child Care not allowed because otherwise available.
Arizona

E. Not considered an Expense of Employment.
Illinois (given as item of need)
Missouri

V. *Care of Sick or Disabled or Dependent Adult*

A. Care of Sick or Disabled
Georgia
Pennsylvania

B. Dependent Adult
Mississippi

VI. *Transportation*

A. To and From Work
California
Delaware
Missouri
Nebraska
New Mexico
North Carolina
Oklahoma
Oregon
Virginia

B. On the Job
Nevada

C. Both A & B
Iowa (up to $44/mo.)
Kansas (maximum $60/mo.)
Kentucky
Minnesota
New Hampshire
Ohio
Rhode Island
South Carolina
Tennessee
Texas
Utah
Vermont (in total flat amount)
Washington
West Virginia
Wyoming

D. To child care
Ohio
Oregon

E. Unspecified
Alaska
Arizona (flat amount)
Colorado
Connecticut (not to exceed $10/mo.)
District of Columbia
Florida (flat amount)
Idaho (included in $10 maximum with clothing and lunches)
Illinois
Indiana
Louisiana
Mississippi ($12/mo. or actual expense)
Montana
New York
Pennsylvania
Wisconsin

VII. *Personal Care Items (specified as such)*

A. Provided
Arizona ($4 flat)
Kansas
Missouri ("personal expenses")
Montana
Vermont (in total flat amount)

B. Personal Needs
Colorado

C. Personal Incidentals
Michigan (in a total flat amount)
Oregon
Wyoming

VIII. *Food*

A. Extra food away from home
Arizona ($12 flat)
Indiana (included in $11 with clothing)
Michigan (in a total flat amount)
Missouri
Montana
New Hampshire
New York (meals incident to employment with specified amounts)
Rhode Island ($1/day to maximum of $26/mo. full-time)
Vermont (in total flat amount)

B. Lunches
California
Idaho (included in $10 maximum with clothing and transportation)
Illinois
Indiana
Kansas (50¢/day)
Michigan (in a total flat amount)
Minnesota
Mississippi ($7/mo.)
New York
Texas
Utah
West Virginia

C. Additional Food
Colorado
Oregon

D. More expensive ready prepared food
New Hampshire

IX. *Clothing*

A. Extra Clothing and Clothing Upkeep
Arizona ($4 flat)
Idaho (included in $10 maximum with clothing and transportation)
Indiana (included in $11 with food)
Kansas
Mississippi ($5/mo.)
Missouri
Nebraska
Oregon
Vermont (in total flat amount)
Washington

B. Special Clothing
Colorado
District of Columbia
Florida (in standard allowance)
Indiana
Iowa
Michigan (in a total flat amount)
Montana
Nebraska
New York
Vermont (in a total flat amount)

C. Uniforms
Florida (in standard allowance)
Illinois
Iowa
Kentucky (and upkeep)
Minnesota
Montana
Nevada
New Hampshire
New York
Ohio
Rhode Island
South Carolina
Tennessee
Texas
Utah
Vermont (in total flat amount)
Virginia
Washington
West Virginia
Wyoming

X. *Special Education and/or Training*
Colorado
Indiana
Louisiana
Montana
New Hampshire (including publications)
South Dakota
Tennessee
Vermont (in total flat amount)

XI. *Telephone*
Colorado
Illinois (Min. rate)
Indiana
Iowa
New Hampshire
Oregon
Pennsylvania
Rhode Island

XII. *Tools*
Florida (in standard allowance)
Idaho
Illinois
Indiana
Iowa
Kansas (also depreciation of tools and equipment)
Kentucky
Minnesota
Montana
Nebraska
Nevada
New Hampshire
New York
Ohio
Pennsylvania
Rhode Island
South Carolina
Tennessee
Texas
Utah
Vermont (in total flat amount)
Virginia
Washington
West Virginia
Wyoming

XIII. *Licenses*
Indiana
Nebraska
New Hampshire
New York
Rhode Island
South Carolina
Tennessee
Vermont (in total flat amount)

XIV. *Special Safety Devices*
Indiana
New Hampshire
Rhode Island
South Carolina
Tennessee
Vermont (in total flat amount)

XV. *Dues to Business Organizations*
Indiana
New Hampshire
South Carolina (also employee clubs and other assessments of this nature)
Tennessee

XVI. *Equipment and Supplies*
Florida (in standard allowance)
Iowa
Kansas (and depreciation)
Nebraska
Virginia

XVII. *Materials*
Florida
Kansas
Kentucky
Minnesota
Montana
Nebraska
Nevada
New York
Ohio
Oregon
Pennsylvania
Rhode Island
South Carolina
Tennessee
Texas
Utah
Vermont (in total flat amount)
Washington
Wyoming

XVIII. *Contributions Expected of People on the Job*
Montana
New Hampshire
Vermont (in total flat amount)

XIX. *Community Activities Arising Out of Employment*
Montana

XX. *Physical Exam*
Montana

XXI. *Chore Service*
Montana

XXII. *Support Payments*
Ohio
Rhode Island (legal attachment of wages)
South Dakota

XXIII. *Foster Care*
South Dakota

MEMORANDUM OF DEPARTMENT OF HEALTH, EDUCATION AND WELFARE DATED APRIL 13, 1972 (ATTACHMENT #4 TO GOVERNMENT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT)

Department Of Health, Education, And Welfare
Social And Rehabilitation Service
Assistance Payments Administration

Date: April 13, 1972

TO: SRS Regional Commissioners
Attn: Associate Regional Commissioners, APA

FROM: Acting Commissioner
Assistance Payments Administration

SUBJECT: Expenses Reasonably Attributable to Earning of Income

Attached for your information is a copy of a memorandum dated March 29, 1972, from the Acting Commissioner, APA, to Mr. James N. McGuire, Acting Associate Regional Commissioner, APA, San Francisco on the above subject.

/s/
JOHN J. HURLEY

Attachment

Boston	Atlanta	Kansas City
New York	Chicago	Denver
Philadelphia	Dallas	San Francisco
		Seattle

COPY

March 29, 1972

Mr. James N. McGuire
Acting Associate Regional Commissioner, APA
San Fransico

Acting Commissioner
Assistance Payments Administration

California Reform Act of 1971, Amended Section 11451.6 Standard Allowance of $50 for Expenses Reasonably Attributable to Earning of Income

1. The 1962 Amendments to the Social Security Act amended the Act to provide that in determining need the State agency shall take into consideration any expenses reasonably attributable to the earning of any such income. Welfare Administration, Bureau of Family Services, State Letter No. 674 attached the publication titled "Public Assistance 1962." It states as follows: "Other work incentives were offered through provisions that . . . require taking into account necessary expenses that can reasonably be attributable to the earning of income in determining need under all the Federally aided assistance programs."

2. In accordance with 45 CFR 233.20(a)(3)(iv), a State Plan must provide that income equal to expenses reasonably attributable to the earning of income will not be included as income. Under 45 CFR 233.20(a)(6)(iv), earned income means the total amount, irrespective of personal expenses, such as income tax deductions, lunches and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers. 45 CFR 233.20(a)(7)(i) also requires the plan to provide as part of the method for disregarding earned income, that all work expenses, personal and non-personal, will be deducted. SRS unnumbered State Letter of September 26, 1969, recognizes that "for State agencies which have objectively and equitably identified a standard amount for expenses reasonably attributable to employment, the tables (for use in applying the disregard) may be further adjusted as demonstrated below."

3. Accordingly, it is clear under the Federal policy that State agencies must, as a minimum, consider those items of work expenses identified in 45 CFR 233.20(a)(6)(iv), namely, mandatory payroll deductions, lunches, transportation to and from work, tools, materials and special uniforms and child case costs incurred because of the employment.

4. HEW has accepted State proposals to use a flat amount for expenses attributable to earning of income (other than child care expenses), where there has been a factual justification of the reasonableness of the flat amount, as being consistent with the Federal requirements for simple and efficient program administration, and as resulting in an equitable and uniformly administered program. This is also consonant with the requirement in 45 CFR 233.20(a)(1) that States determine need and the amount of assistance for all applicants and recipients on an objective and equitable basis.

5. Individualization of expenses is also acceptable under Federal policy. The use of a justified flat amount for some items, rather than all items, is also acceptable. For example, State agencies have developed justified flat amounts for all expenses other than mandatory payroll deductions and child care (which costs are recognized on an individual basis). There are other intermediate combinations. Individualization of expenses up to a maximum is not acceptable, because most recipients would not be treated equitably and uniformly under such a method.

6. From the data submitted by the California agency, the $50 flat amount clearly cannot be substantiated. The $63 flat amount which California may be considering has some substantiation, but we would point out that the sample size is small, the study used measured only some expenses, and amounts for other expenses were developed from sources outside of the State's own study. We believe this to be an acceptable starting point and may be tentatively acceptable pending a further study to secure more comprehensive data in order to justify the amount through further substantiation.

7. This has been approved by the Office of the General Counsel.

/s/ _____
JOHN J. HURLEY

LETTER OF MARCH 22, 1978, TO BILL GALVIN, WITH ATTACHMENTS (ATTACHMENT #3 TO GOVERNMENT'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT)

March 22, 1978

Note to Bill Galvin:

Staff has prepared the attached material to provide you with the additional information you requested on the *treatment of work expenses*. The material was not completed in time for me to review it before leaving for Dallas. However, I hope that it will serve your purposes.

If you have any questions or need any more information please give me a call or, if you need it before I return on Friday, you can call Dave Hurwitz or Mildred Hoadley directly.

/S/

BARRY L. VAN LARE

Attachment:

bcc: Jerry Solomon
Dave Hurwitz
Mildred Hoadley

1. All States consider State, Federal and Social Security taxes as expenses of employment.

2. The following is a summary of standard work related expenses allowances and limitations used by States. In accordance with the U.S. Supreme Court decision in *Shea* v. *Vialpando*, all States except Washington that use standard work expense allowances or limitations permit deductions in excess of the amount specified where expenses are actually incurred, verified as necessary, and reasonable. Child care is not included in the limitations or flat amounts used by any State except Washington.

Alabama	—	A *flat* amount of 20% of gross earned income up to $50 is used.
Arizona	—	A *flat* amount of $48 for full time employment and $24 for half time employment is used.
Arkansas	—	A *flat* amount of $55 is used.
California	—	Limitations on transportation—if used own car, .15 per mile; if rode in someone's car, .07 per mile.
Colorado	—	A *flat* amount of $30 is used for all expenses other than mandatory payroll deductions.
Delaware	—	A *flat* amount of $50 is used for all expenses except payments for health and medical plans, licenses and permits required to produce earnings, and special devices needed by handicapped person.
District of Columbia	—	A *flat* amount of $58 for full-time employment and $44 for part-time employment is used for all expenses except mandatory payroll deductions, tools, and special uniforms.
Florida	—	A *flat* amount of $50 is used for all expenses.
Georgia	—	A *flat* amount of $50 is used for all expenses.

Guam — A *flat* amount of $45 is used for all expenses of full-time employment except mandatory payroll deductions. Expenses of part time employment are prorated.

Indiana — The following limitations are used:
Transportation—least expensive
Lunches—.60 per meal
Mileage—.10 per mile

Iowa — A *flat* amount of $30 is used for all expenses—except mandatory payroll deductions.

Kansas — A *flat* amount of $30 is used for all expenses—except mandatory payroll deductions.

Louisiana — *Flat* amounts are used on a sliding scale based on total earnings.

Earnings		Expenses	Self-Employment Expenses
$ 10-	$ 29.99	$ 9	$ 9
30-	44.99	11	11
45-	69.99	12	12
70-	119.99	15	14
120-	199.99	28	25
200 and up		30	30

Maryland — A *flat* amount of 20 percent of gross earnings is used for all expenses except lunches which are recognized only when deductions by the employer is a condition of employment.

Massachusetts — A *flat* amount of $28 is used for full time employment. This allowance is reduced proportionately for persons who work less than full time. The flat amount is for the additional cost of food, clothing and personal care incurred by the applicant or recipient. Other work related expenses are deducted invidually.

Michigan — A *flat* amount of $40 is used for all expenses except mandatory payroll deductions.

Mississippi — A *flat* amount of $24 is used for all expenses except manditory payroll deductions.

Missouri — A sliding scale is used for all expenses except mandatory deductions.

Earnings	*Expenses*
$ 35-50	$ 2.80
50-75	11.70
75-100	15.60
100-125	19.50
125-150	21.40
150-175	23.10
175-200	23.80
200-225	25.50
225-250	26.70
250-275	28.30
275-305	29.10
305-1200	30.00

Montana — A *flat* amount of $25 is used for lunches and miscellaneous expenses. Mandatory payroll deductions, transportation, tools, materials, and special uniforms are deducted separately.

Nebraska — A *flat* amount of $25 is used for all expenses except mandatory payroll deductions.

Nevada — A *flat* amount of $25 is used for all expenses except mandatory payroll deductions, lunches, and special uniforms.

New Hampshire — A *flat* amount of $18 is used for those expenses recognized by the State. Deductions for any additional items which the Chief, Bureau of Programs Operations may allow on an individual basis are made separately.

New Jersey — A *flat* amount of $50 is used for all expenses except mandatory payroll deductions.

New Mexico — A *flat* amount of $42 is used for all expenses.

North — Carolina — A sliding scale is used based on earnings for all expenses

Earnings	*Expenses*
$ 1-50	$ 1.50
51-100	3.00
101-150	9
151-200	16
201-300	37
301-400	68
401 up	109

North Dakota — A flat amount of $30 is used for all expenses except mandatory payroll deductions.

Ohio — A *flat* amount of $50 is used for all expenses.

Oklahoma — $16 to $30 monthly wages—$15 expenses
$31 to $45 monthly wages—$20 expenses
$46 to $60 monthly wages—$25 expenses
$61 and up monthly wages—$30 expenses

Pennsylvania — A *flat* amount of .12 per mile is used for transportation mileage and $30 is used for car payments.

Puerto Rico — A *flat* amount of $25 is used for all expenses.

South Dakota — A *flat* amount of $30 is used for all expenses except mandatory payroll deduction

Tennessee — A *flat* amount of $65 is used for all expenses.

Texas — A *flat* amount of $65 is used for all expenses.

Utah — A *flat* amount of $30 is used for all expenses except mandatory payroll deductions.

Virginia — A *flat* amount of $25 is used for all expenses.

Washington (see attachment) — A *flat* amount of $5.70 is used for special uniforms and clothing. Other expenses are deducted separately.

West Virginia — A *flat* amount of $21 is used for transportation to and from work. Other expenses are deducted separately.

Wisconsin — A *flat* amount of 18 percent of gross earned income is used for all expenses.

The following states consider reasonable work-related expenses as incurred:

Alaska	New York
Connecticut	Oregon
Hawaii	Rhode Island
Idaho	South Carolina
Illinois	Vermont
Kentucky	Virgin Islands
Maine	Wyoming
Minnesota	

Washington—

A maximum of .92 per hour per child is allowed for less than 7 hours per day child care.

A maximum of $6.42 per day per child is allowed for 7 or more hours per day child care.

A maximum of $32.10 per week per child is allowed to accomodate unusual work schedules.

A maximum of .08 per mile is allowed for transportation.

Washington is the only State that uses absolute maximums on expenses of employment. The Regional Office has not approved State plan amendments that the State implemented July 1, 197 . The State Plan amendment has been sent to Central Office with a recommendation that it be disapproved. The Regional Office has also submitted the refusal of the State to consider additional expenses in excess of the maximums in accordance with the decision of the Supreme Court in *Shea* v. *Vialpando* as a question of compliance.

LETTER OF LINDA S. MCMAHON, ASSOCIATE COMMISSIONER FOR FAMILY ASSISTANCE, DATED SEPTEMBER 11, 1981 AND ATTACHMENT (EXHIBIT J TO PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

NOTE TO: PARTICIPANTS OF THE 1981 AFDC LEGISLATIVE IMPLEMENTATION CONFERENCE

SUBJECT: Questions and Answers on the Social Welfare Amendments of 1981

Attached you will find questions and answers on the Social Welfare Amendments of 1981. The questions were developed for the most part by staff from State welfare agencies and regional staff of the Office of Family Assistance.

The responses reflect the current thinking on the direction of the regulations. We hope this material will prove useful to you in your efforts to implement the 1981 Amendments.

/s/

LINDA S. MCMAHON
Associate Commissioner
for Family Assistance

Attachment

Earned Income Disregards

Q. Can a State set a cap on the child care disregard below $160?

A. A State may set a lower cap for the cost of child care for individuals who are employed only part time. However, it must disregard actual child care costs up to $160 for full time workers, provided the costs are reasonable and job related.

Q. When does the limitation on the four month $30+ 1/3 earned income disregard begin for cases which, as of October 1, 1981, have already been receiving the $30+ 1/3 for four consecutive months?

A. The four month limit on the income disregard begins October 1, 1981. Current recipients can receive the $30 + disregard for October through January, 1982, but will lose it February 1, 1982. They may not receive it again until 12 consecutive months has elapsed during which time they did not receive assistance.

Q. Has the $5 income disregard in 45 CFR/233.20(a)(4) been eliminated?

A. Yes, the $5 income disregard has been eliminated.

Q. Will income be redefined in the new regulations?

A. No, for purposes of the rulemaking, the income definitions not specifically addressed by the Reconciliation Act remain unchanged.

Q. How will the 4 month earned income rule apply in AFDC cases with multiple wage earners?

A. Each employed member in the assistance unit can receive the $30 and 1/3 earned income disregard for up to four consecutive months.

Q. Are any changes anticipated in the Medicaid 4 month extension period as a result of the AFDC earned income changes?

A. No, recipients terminated from AFDC as a result of an increase in their earnings or hours of work will continue to be eligible for the four month extended Medicaid coverage.

Q. Under the new provision, if someone went off the rolls and reapplied within 4 months, would their eligibility be determined using the $30 + 1/3 disregard?

DECLARATION OF CATHERINE BASS, DATED FEBRUARY 17, 1982 (ATTACHMENT TO PLAINTIFF'S MEMORANDUM IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT AND PERMANENT INJUNCTION)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NORTHERN CALIFORNIA

Civil Action
No. C 81-4457 TEH

SANDRA TURNER, ET AL., PLAINTIFFS,

v.

MARVIN J. WOODS, ET AL., DEFENDANTS

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Attorneys for Plaintiffs

DECLARATION OF CATHRINE BASS

I, CATHRINE BASS, declare as follows:

1. I am a resident of San Diego County.

2. I receive Aid to Families with Dependent Children for my children who are 8, 12, and 13 years old, respectively, for my niece and nephew who reside with me and who are, respectively, 7 and 11 years old, and for me.

3. I am employed fulltime. My monthly salary is $730, of which $83.76 is withheld each month for mandatory payroll deductions as follows: $29 for federal income taxes; $5.84 for State Disability Insurance; and $48.92 for social security taxes (FICA). My income after mandatory payroll deductions each month is $646.24.

4. I have to travel each day 30 miles to get to work and back. My transportation expenses are approximately $180 per month.

5. My child care expenses are $235 per month.

6. In November 1981, I received the Notices of Action attached and incorporated hereto as Exhibit 1.

7. In December 1981, I received the Notice of Action attached and incorporated hereto as Exhibit 2.

8. In January 1982, I received the Notices of Action attached and incorporated hereto as Exhibit 3.

9. Since Mid-November, I have received no other Notice of Action affecting the AFDC benefits which I receive for my family.

10. As a result of receiving lower AFDC benefits because of recent changes in state and federal law, I am less able to meet subsistence living expenses for my family. I have moved to reduce my rental expenses. This move and other cost saving measures which I will have to take cause great suffering to my family.

I declare under penalty of perjury that the foregoing is true and correct. Executed at San Diego, California, on 2-17-82, 1982.

/S/ _____
CATHRINE BASS

AFFIDAVIT OF LINDA S. McMAHON, DATED AUGUST 9, 1982 (ATTACHMENT TO FEDERAL DEFENDANT'S BRIEF IN SUPPORT OF MOTION TO RECONSIDER)

No. C 81 4457 TEH

SANDRA TURNER, ET AL., PLAINTIFFS,

v.

MARION J. WOODS, ET AL., DEFENDANTS

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA, DEFENDANT, AND THIRD PARTY PLAINTIFF,

v.

RICHARD SCHWEIKER, SECRETARY OF HEALTH & HUMAN SERVICES, THIRD PARTY DEFENDANT

AFFIDAVIT OF LINDA S. McMAHON

District of Columbia
SS:

I, Linda S. McMahon, being duly sworn, depose and say as follows:

1. I am the Associate Commissioner for Family Assistance, Social Security Administration, Department of Health and Human Services (HHS). In that capacity, I have overall responsibility for the administration of the federal Aid to Families with Dependent Children (AFDC) Program under Title IV of the Social Secu ity Act.

2. Projected cost savings for provisions found in the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, were developed by the Department of Health and Human Services. The Office of Family Assistance through its Office of Policy and Evaluation assisted in the development of these projections.

3. The projected cost savings for the earned income disregard provisions, which included the $75 work expense limit, were based on subtracting the disregard from gross rather than net income.

4. The Department of Health and Human Services estimated that the combined proposal to standardize the work expense deduction at $75, to limit child care to $160 per child, and to resequence the application of the $30-and-one-third disregard would save $182 million in FY 82. The Congressional Budget Office (CBO) estimated the proposal would save $206 million. The difference resulted from the utilization of differing assumptions about the size of the AFDC caseload and not in the estimating methodology of the particular proposal. The savings figure of $182 million presupposes that the $75 is to be applied to gross and not earnings net of mandatory work expenses. By utilizing the same methodology as the Department used earlier, but applying the $75 to net income, this disregard would produce a savings of only $79 million, far below either HHS's or CBO's estimate.

5. If the $75 disregard were applied to net rather than gross income, the change to the flat $75 amount would cost rather than a save money over prior law when all actual work expenses were applied to gros income.

/s/ _____
LINDA S. MCMAHON
Associate Commissioner for Family Assistance
Social Security Administration
Department of Health and Human Services

District of Columbia
Sworn to before me this day of August, 1982
/s/ _____
Notary Public
My Commission Expires 5-31-83

TABLES 18 AND 19 FROM DEPARTMENT OF SOCIAL SERVICES PROGRAM, INFORMATION REPORT 1982-01 (ATTACHED TO POINTS & AUTHORITIES OF DEFENDANT DEPARTMENT OF SOCIAL SELVICES IN SUPPORT OF MOTION FOR RECONSIDERATION AND STAY, FILED AUGUST 6, 1983)

TABLE 18
AFDC-FG

Reason and Average Amount of Nonassistance Income Disregarded in AFDC Budget

Reason for Disregard	Families			Average
	Number	Percent	of Disregarded Income	
TOTAL	421,411	100.0		
No disregarded income	373,370	88.6		
Disregarded income:			100.0	
Total deductions	48,041[1]	11.4		$338
$30 and 1/3 exemption	48.041		100.0	184
Child care	21,426		44.6	108
Mandatory deductions	39,922		83.1	83
Transportation	39,153		81.5	48
Other work-related expenses	4,20		9.2	32

[1]Since families had more than one type of income disregard item numbers and percentage of families with disregarded income do not add to item totals.

TABLE 19
AFDC-FG

Monthly Amount of Social Securities Benefits

Monthly Amount of Social Security Benefits	Families		
	Number	Percent	
TOTAL	421,411	100.0	
Does not receive Social Security	410,454	97.4	
Receives Social Security	10,957	2.6	100.0
$ 1-24	—		—
25-49	1,457		13.3
50-74	734		6.7
75-99	2,192		20.0
100-149	2,192		20.0
150-199	2,191		20.0
200-249	—		—
250-299	—		—
300 and over	2,191		20.0
Average amount		$165	

Supreme Court of the United States

No. 83-1097

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER,

v.

SANDRA TURNER, ET AL.

ORDER ALLOWING CERTIORARI. Filed *February 27, 1984.*

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

PETITIONER'S

BRIEF

No. 83-1097

In the Supreme Court of the United States

OCTOBER TERM, 1983

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

SANDRA TURNER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the $75.00 standard work expense disregard under Section 402(a)(8) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(8), which is deducted from "income" under Section 402(a)(7) of the Act, 42 U.S.C. (Supp. V) 602(a)(7), in determining eligibility and benefits under the Aid to Families with Dependent Children program, encompasses all work expenses, including mandatory payroll deductions.

II

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Debra Scruggs and Jerrylean Baker were appellees in the court of appeals. Kyle McKinsey, Deputy Director of the California Department of Social Services, and Mary Ann Graves, Director of the California Department of Finance, were appellants in the court of appeals.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Supp. App. 1a-36a)[1] is reported at 707 F.2d 1109. The opinion of the district court (Pet. App. 29a-56a) is reported at 559 F. Supp. 603.

JURISDICTION

The judgment of the court of appeals (Pet. App. 57a) was entered on June 10, 1983. A petition for rehearing was denied on September 7, 1983 (Pet. App. 58a-59a). On November 18, 1983, Justice Rehnquist extended the time for filing a petition for a writ of certiorari to and

[1] The court of appeals filed two opinions in this case. The first opinion, issued June 10, 1983, was reproduced in the appendix to the certiorari petition. Pet. App. 1a-28a. The court issued a revised opinion on August 11, 1983. That revised opinion is reproduced as a supplemental appendix to this brief.

including January 5, 1984. The petition was filed on January 4, 1984, and was granted on February 27, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE AND REGULATIONS INVOLVED

Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(7), provides in relevant part:

> A State plan for aid and services to needy families with children must * * *
>
> (7) except as may be otherwise provided in paragraph (8) or (31) and section 615 of this title, provide that the State agency—
>
> (A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid * * *,

Section 402(a)(8) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(8), provides in relevant part:

> (A) * * * [I]n making the determination under paragraph (7), the State agency—
>
> (i) shall disregard all of the earned income of each dependent child receiving aid to families with dependent children who is (as determined by the State in accordance with standards prescribed by the Secretary) a full-time student or a part-time student who is not a full-time employee attending a school, college, or university, or a course of vocational or technical training designed to fit him for gainful employment;
>
> (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month);
>
> (iii) shall disregard from the earned income of any child, relative, or other individual specified in clause (ii), an amount equal to expenditures for care in such month for a dependent child, or an incapacitated individual living in the same home as the dependent child, receiving aid to families with dependent children and requiring such care for such month, to the extent that such amount (for each such dependent child or incapacitated individual) does not exceed $160 (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month); and
>
> (iv) shall disregard from the earned income of any child or relative receiving aid to families with dependent children, or of any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, an amount equal to the first $30 of the total of such earned income not already disregarded under the preceding provisions of this paragraph plus one-third of the remainder thereof * * *; and
>
> (B) provide that (with respect to any month) the State agency—
>
> (ii)(I)
>
> * * * * *
>
> (II) in the case of the earned income of a person with respect to whom subparagraph (A)(iv) has been applied for four

> consecutive months, shall not apply the provisions of subparagraph (A)(iv) for so long as he continues to receive aid under the plan and shall not apply such provisions to any month thereafter until the expiration of an additional period of twelve consecutive months during which he is not a recipient of such aid.

45 C.F.R. 233.20(a)(6)(iv) provides:

> With reference to commissions, wages, or salary, the term "earned income" means the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

45 C.F.R. 233.20(a)(3)(ii)(D) provides in relevant part:

> [I]n determining need and the amount of the assistance payment, after all policies governing the reserves and allowances and disregard or setting aside of income and resources * * * have been uniformly applied:
>
> * * * * *
>
> (D) Net income, * * * and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

STATEMENT

This case involves the proper computation of benefits payable under Subchapter IV, Part A, of the Social Security Act, Aid to Families with Dependent Children (AFDC), 42 U.S.C. (& Supp. V) 601 *et seq.* In particular, the case presents the question whether net income

(after mandatory deductions for social security, local, state and federal income taxes) or gross income is to be utilized by the states in calculating AFDC benefits under Section 402(a)(7) of the Act, 42 U.S.C. (Supp. V) 602(a)(7).

1. The AFDC program is a joint federal/state public assistance program that was created in 1935 to aid needy families with dependent children. Social Security Act, ch. 531, 49 Stat. 620. The federal government reimburses the states for a percentage of the funds they expend aiding families with needy children. 42 U.S.C. (& Supp. V) 603. In return, the states administer their assistance programs pursuant to a "state plan" that conforms to applicable federal statutory and regulatory requirements. 42 U.S.C. (& Supp. V) 602. State plans establish both the "standard of need," which is "the amount deemed necessary by the State to maintain a hypothetical family at a subsistence level," and the "level of benefits," which determines the maximum amount of assistance actually paid. *Shea* v. *Vialpando*, 416 U.S. 251, 253 (1974); *Rosado* v. *Wyman*, 397 U.S. 397, 408-409 (1970). The amount of the AFDC grant is determined by comparing a family's income, as computed according to Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(7), with the state standard of need. If a family's income under Section 402(a)(7) "is less than the predetermined statewide standard of need, the applicant is eligible for participation in the program and the amount of the assistance payments will be based upon that difference." *Shea*, 416 U.S. at 254.[9]

Prior to 1981, Section 402(a)(7) required state agencies to "take into consideration any * * * income and resources of any child claiming aid to * * * dependent

---

[9] States need not, however, pay the entire difference between a family's income and the statewide standard of need. States may establish "dollar maximums on the amount of public assistance payable to any one individual or family." *Rosado*, 397 U.S. at 408-409.

children," as well as all "expenses reasonably attributable to the earning of any such income," in calculating a family's eligibility for AFDC benefits. 76 Stat. 188 (1962). In 1981, however, Congress radically changed the AFDC program with the enactment of the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. No. 97-35, 95 Stat. 357. While keeping intact the language in Section 402(a)(7) that instructs the states to take into account a family's income and resources, Congress eliminated the requirement that the states also consider the expenses reasonably attributable to the earning of income. 42 U.S.C. (Supp. V) 402(a)(7). Instead, Congress amended Section 402(a)(8) of the Social Security Act to create a flat $75 "work expense" deduction, or "disregard," to be taken from an individual's "earned income." 42 U.S.C. (Supp. V) 602(a)(8)(A)(ii). At the time this last amendment was made, the term "earned income" in Section 402(a)(8) was defined in a long-standing administrative regulation as the "total amount [of wages or salary], irrespective of personal expenses, such as income-tax deductions * * *." 45 C.F.R. 233.20(a)(6)(iv).

Because state, federal and social security taxes had been regarded by the Secretary and most states as expenses reasonably attributable to the earning of income within the meaning of Section 402(a)(7),[5] the Secretary advised state agencies that, in light of OBRA's deletion of the work expenses deduction from Section 402(a)(7), mandatory payroll deductions were to be included within the newly created $75 work expense disregard of Section 402(a)(8). That disregard, moreover, was to be taken from gross rather than net income, in accordance with the Secretary's past administrative construction of Section 402(a)(8). 45 C.F.R. 233.20(a)(6)(iv). The State of California published regulations implementing these

[5] *See Shea*, 416 U.S. at 254-255; *Bell* v. *Hottleman*, 558 F. Supp. 396, 392 n.8 (D. Md.), aff'd, 721 F.2d 131 (4th Cir. 1983), petition for cert. pending, No. 83-6269.

instructions. California Dep't of Social Services, *Manual of Pol'y and Proc.*, Eligibility and Assistance Standards, EAS § 44-113.21, 44-113.212 to 44-113.213 (Nov. 10, 1981).[6] Under the new formula, the average AFDC grant to the majority of the 45,000 AFDC families with earned income within California was reduced.

2. Respondents, a class of all past, present and future AFDC recipients in California, brought this suit in the United States District Court for the Northern District of California to challenge the California regulations implementing the Secretary's instructions.[7] Respondents asserted that those regulations improperly construed the term "income" in Section 402(a)(7) as gross income, and erroneously included all work expenses—including mandatory payroll deductions—within the $75 work expense disregard of Section 402(a)(8). They argued that, from the inception of the AFDC program, Congress had in-

[6] The California regulations provide in relevant part:

§ 44-113.21—Computation of Net Nonexempt Earned Income for Aid to Families with Dependent Children

* * * * *

.211 Determine the total amount of commissions, wages, or salary earned as an employee during or applicable to the month (*i.e.*, total income irrespective of exemption, voluntary or involuntary deductions) * * *.

.212 Determine the total profit earned from self-employment by a recipient whose earnings are not exempted under Section 44-111.22 by offsetting the business expenses against the gross income from self-employment.

a. "Personal expenses such as income tax payments, lunches, entertainment and transportation to and from work are not classified as business expenses and shall not be deducted from gross income in determining total profit earned from self-employment.

* * * * *

.213 For each recipient, combine any total earnings determined in .211 above with any total profit determined in .212.

[7] The Secretary was brought into the action by the State of California as a third-party defendant.

tended the term "income" in Section 402(a)(7) to mean net income actually available for use. Respondents therefore claimed that they were entitled to have state and federal taxes and social security deductions disregarded by the State when calculating resources under Section 402(a)(7).

The district court agreed with respondents, holding that Congress did not intend the term "income" in Section 402(a)(7) to include mandatory payroll deductions. Accordingly, the court granted respondents' motion for summary judgment and enjoined the State of California from implementing its new regulations (Pet. App. 45a). The court also enjoined the Secretary from terminating the provision of federal matching funds to the State (ibid.).

3. The court of appeals affirmed (Supp. App. 1a-36a). The court noted that no provision of the Social Security Act defined the word "income" in Section 402(a)(7) and concluded that the literal language of the section was of little aid in resolving the question of congressional intent (Supp. App. 12a). The court, therefore, examined at some length the legislative history and administrative interpretation of Title IV of the Social Security Act (*id.* at 12a-28a). Its inquiry, however, focused almost entirely on the intentions of pre-OBRA Congresses (*ibid.*).

The court of appeals reasoned that Section 402(a)(7), as originally enacted, indicated Congress's "genuine * * * concern that resources counted against a family be actually available for its use" (Supp. App. 13a). Thus, the court concluded that Section 402(a)(7), as passed in 1939, required the states to use income net of mandatory payroll withholdings in calculating AFDC benefits, even though "mandatory payroll deductions did not exist in 1939" (Supp. App. 13a). The court buttressed this conclusion by referring to past and present administrative regulations which provide that income must be actually available for use before it is utilized in calculating AFDC benefits (*id.* at 13a-16a).

The court of appeals concluded that, until about 1974, there was no consistent categorization of mandatory payroll deductions as "work expenses" (Supp. App. 26a-27a). The court accordingly rejected the argument that Congress had intended mandatory payroll deductions to be subsumed within Section 402(a)(8)'s work expense disregard, even though the OBRA Congress had specifically deleted Section 402(a)(7)'s mandate to deduct expenses "reasonably attributable" to the earning of income. Because the court doubted that "Congress had adequate notice" that payroll deductions were considered work expenses, it "refuse[d] to hold that [by amending Sections 402(a)(7) and (8)] Congress has repealed a forty-year-old policy by implication" (Supp. App. 29a).

Finally, the court of appeals asserted that its construction of Sections 402(a)(7) and (8) of the Social Security Act served the legislative purposes underlying the Act (Supp. App. 29a-36a). The court noted that the legislative history of Title IV evidenced a strong congressional desire to promote employment as an alternative to the AFDC program (*id.* at 29a, citing 42 U.S.C. 601). The court then observed that the Secretary's construction of Sections 402(a)(7) and (8) would discourage employment, because under that approach some AFDC recipients could increase their disposable income by refusing employment in order to receive full AFDC grants (Supp. App. 32a-34a). Relying primarily on its perception of the intent of pre-OBRA Congresses to avoid financial disincentives to employment, the court concluded that mandatory payroll deductions "are not income for purposes of AFDC calculations performed pursuant to 42 U.S.C. §§ 602(a)(7) and 602(a)(8)" (Supp. App. 34a).

SUMMARY OF ARGUMENT

The court of appeals concluded that the legislative history and administrative interpretation of Section 402(a)(7) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(7), as well as the congressional purposes underlying the AFDC statute, compelled the states to deduct

mandatory payroll withholdings in addition to Section 602(a)(8)'s flat $75 work expense disregard (42 U.S.C. (Supp. V) 602(a)(8)(A)(ii)) in calculating AFDC benefits. A reasoned analysis of the language of Sections 602(a)(7) and (8), their legislative and administrative history, and the congressional goals informing the AFDC program demonstrate the error of the lower court's decision.

A. In calculating the amount of an AFDC grant, the Social Security Act plainly requires the states to consider, first, the gross wages or "earned income" of an AFDC beneficiary, as well as any other income available to the applicant. 42 U.S.C. (Supp. V) 602(a)(7), 602(a)(8). The states are then required to consider the various "disregards" authorized by Congress in Section 602(a)(8) of the Act. As modified by the Omnibus Budget Reconciliation Act in 1981, that section permits the states to disregard up to $160 in child care expenses as well as a flat $75 deduction "in lieu of itemized work expenses" (S. Rep. 97-139, 97th Cong., 1st Sess. 435 (1981)).

The "disregards" provided by Section 602(a)(8) are to be taken from gross income (45 C.F.R. 233.20(a)(6)(iv)). Moreover, the flat $75 work expense disregard contained in Section 602(a)(8) subsumes the mandatory payroll withholdings at issue here for the simple reason that, prior to OBRA, the Secretary and the states uniformly treated mandatory payroll deductions for income and social security taxes as itemized work expenses. *See Shea* v. *Vialpando*, 416 U.S. 251, 254-255 (1974). There is no mention in the language or legislative history of OBRA of an additional disregard for tax withholdings.

B. The court of appeals disagreed with the above construction of Section 602(a)(7) of the Social Security Act (42 U.S.C. (Supp. V) 602(a)(7)) on the basis of the legislative history and administrative interpretation of that section. The lower court's reading of the background of Section 602(a)(7), however, is seriously flawed.

Contrary to the arguments successfully presented by respondents below, Section 402(a)(7), as originally enacted in 1939 (53 Stat. 1379-1380), did not require the states to deduct mandatory payroll withholdings from an AFDC applicant's income. Indeed, in 1962 Congress specifically amended Section 402(a)(7) so that work expenses, such as mandatory payroll deductions, would not be considered in the AFDC benefit calculation (76 Stat. 188)—an amendment that would have been unnecessary if the court of appeals' construction of Section 402(a)(7) were correct. That work expense provision, which permitted an AFDC beneficiary to deduct from his income the actual amount of all expenses "reasonably attributable" to the earning of income (*ibid.*), was abolished by Congress in 1981 and replaced with the flat $75 work expense disregard of Section 402(a)(8).

Agency practices regarding the treatment of mandatory payroll deductions also refute respondents' and the court of appeals' interpretation of Section 402(a)(7). The "availability" doctrine adopted by the court of appeals (Supp. App. 15a-17a) has never been applied to mandatory payroll withholdings. Indeed, the "availability" concept—*i.e.*, that earned income is not "income" within the meaning of Section 402(a)(7) unless it is actually "available" to defray living expenses—sweeps so broadly that it would completely negate Congress's clear intent in 1981 to enact a flat work expense disregard in place of an itemized work expense deduction. Work expenses such as uniform costs, public transportation fares, and union dues are as "unavailable" to employed AFDC recipients as income and social security tax deductions. Yet these expenses plainly fall within the ambit of OBRA's work expense cap. Mandatory payroll deductions should be accorded no different treatment.

C. The Secretary's construction of Sections 402(a)(7) and (8) is fully consistent with the congressional policies underlying the AFDC program. The changes in the benefit calculation process mandated by OBRA do indeed re-

sult in lowering the level of payments received by many AFDC recipients with earned income. Congress, however, was well aware of the impact of its actions. The Senate and the House of Representatives amended Sections 402(a)(7) and (8) in 1981 despite the fact that—as was repeatedly brought to their attention—the amendments might create financial disincentives to employment.

Congress concluded in 1981 that previous attempts to encourage employment and self-sufficiency on the part of AFDC recipients by means of financial incentives had been unsuccessful. It therefore "embarked on a new course" (*James* v. *O'Bannon*, 715 F.2d 794, 809 (3d Cir. 1983), petition for cert. pending, No. 83-6168)). That "new course" coupled the amendments to Sections 402(a)(7) and (8) with "provisions • • • aimed at providing employment for AFDC recipients," in order to "decrease welfare dependency, and emphasize the principle that AFDC should not be regarded as a permanent income guarantee" (S. Rep. 97-139, *supra*, at 502-503). The court of appeals failed to give effect to this most recent expression of the legislative will.

ARGUMENT

AMOUNTS WITHHELD FOR TAXES ON EARNED INCOME RECEIVED BY AFDC BENEFICIARIES MAY NOT BE DEDUCTED FROM "INCOME" UNDER SECTION 402(a)(7) OF THE SOCIAL SECURITY ACT, 42 U.S.C. (SUPP. V) 602(a)(7), IN DETERMINING AFDC ELIGIBILITY AND BENEFITS

This case presents a straightforward question of statutory construction: whether mandatory payroll deductions fall within the flat $75 work expense disregard enacted by Congress as part of the 1981 OBRA amendments to the AFDC program (42 U.S.C. (Supp V) 602(a)(8)(A)(ii)). Of the four courts of appeals that have addressed the issue, three have agreed with the government's position that mandatory payroll deductions are included within the newly created work expense disregard. *James* v. *O'Bannon*, 715 F.2d 794 (3d Cir. 1983), petition for cert. pending, No. 83-6168; *Bell* v. *Massinga*, 721 F.2d 131 (4th Cir. 1984), petition for cert. pending, No. 83-6269; *Dickenson* v. *Petit*, 728 F.2d 23 (1st Cir. 1984). Only the Ninth Circuit, in a decision examined but rejected by the above three courts, has concluded otherwise.

A. The Language And Structure Of Sections 402(a)(7) And (8) Require The Inclusion Of Mandatory Payroll Deductions Within OBRA's Flat $75 Work Expense Disregard

The court of appeals found that the language of Section 402(a)(7) "is not helpful" in resolving the contentions raised by respondents (Supp. App. 12a). The language of the AFDC statute, however, is not as unilluminating as the lower court concluded. Indeed, the language and structure of Sections 402(a)(7) and (8) plainly demonstrate that mandatory payroll deductions should not be accorded specialized treatment in the calculation of AFDC benefits but instead are included within the "work expense" disregard of Section 402(a)(8).

Section 402(a)(7) requires that "any • • • income and resources" of an AFDC beneficiary be considered in determining need, "except as • • • otherwise provided in [Section 402(a)(8)]" (42 U.S.C. (Supp. V) 602(a)(7)). Section 402(a)(8), by its express terms, applies to "earned income" (42 U.S.C. (Supp. V) 602(a)(8)), which is an obvious subset of the more inclusive term "income" utilized by Congress in Section 402(a)(7). Indeed, because the various subsections of a statute should be "reconciled so as to produce a symmetrical whole" (*FPC* v. *Panhandle Eastern Pipe Line Co.*, 337 U.S. 498, 514 (1949)), the "most natural reading of [Sections 402(a)(7) and (8)] is that 'earned income,' within the meaning of § [4]02(a)(8), is merely one kind of 'income' within the meaning of § [4]02(a)(7)" (*James* v. *O'Bannon*, 715 F.2d at 802).

Thus, in calculating the amount of an AFDC grant, the Social Security Act plainly requires the states to consider all "income" of a recipient (42 U.S.C. (Supp. V) 602(a)(7)). If that "income" includes "earned income," the provisions of Section 402(a)(8) come into play (42 U.S.C. (Supp. V) 602(a)(8)). That section, as amended in 1981, authorizes the states to disregard from the "earned income" of an applicant up to $160 in child care expenses as well as a flat $75 deduction "in lieu of itemized work expenses" (S. Rep. 97-139, 97th Cong., 1st Sess. 435 (1981)). The flat $75 work expense disregard of Section 402(a)(8), moreover, is to be taken from gross—not net—income for the simple reason that the term "earned income" in Section 402(a)(8) has been consistently defined as "the total amount [of wages or salary], irrespective of personal expenses, such as income-tax deductions" (45 C.F.R. 233.20(a)(6)(iv)).

In light of the above statutory scheme, the proper outcome of this litigation is apparent. The AFDC benefit calculation begins with gross income, and the payroll deductions disputed by respondents are subsumed within the Section 402(a)(8) "work expense" disregard. Indeed, the court of appeals conceded that "if mandatory payroll deductions enter into income at all, they must be treated as work-related expenses subject to the $75 ceiling enacted by OBRA, because no separate disregard for payroll withholding exists" (Supp. App. 26a (emphasis deleted)). The court below avoided this straightforward result only by holding that mandatory payroll deductions "are not income" for purposes of computing AFDC benefits (*id.* at 34a). That conclusion, however, required the court to contort not only the structure,* but also the legislative history and administrative interpretation of the Social Security Act.

*In order to calculate the disregards provided by Section 402(a)(8), the court of appeals' decision requires the states, first, to subtract mandatory payroll expenses under Section 402(a)(7), then to calculate the amount to be disregarded under Section 402(a)(8) on the basis of gross—not net—income, and finally to subtract that amount from net income. The decision, in short, creates "an exceedingly cumbersome definition of gross income for purposes of subsection 402(a)(8)." *Dickenson* v. *Petit*, 569 F. Supp. 636, 640 (D. Me. 1983), aff'd, 728 F.2d 23 (1st Cir. 1984).

The decision is all the more remarkable because it requires an initial step in the need-determination process—the subtraction of mandatory payroll expenses under Section 402(a)(7)—that is not mentioned anywhere in the regulations implementing the section. In light of the fact that the regulations at 45 C.F.R. 233.20(a)(3) through 233.20(a)(11) have historically given very detailed instructions to state agencies on the treatment of income and resources, it is "implausible * * * that such detailed regulations * * * would omit such an important step." *James* v. *O'Bannon*, 557 F. Supp. 631, 640 (E.D. Pa. 1982), aff'd, 715 F.2d 794 (3d Cir. 1983), petition for cert. pending, No. 83-6188. See also *Dickenson* v. *Petit*, 569 F. Supp. at 645.

B. The Legislative History And Administrative Interpretation Of Sections 402(a)(7) And (8) Do Not Require Specialized Treatment Of Mandatory Payroll Deductions

The court of appeals found that Section 402(a)(7), as originally enacted, required the states to "offset only net income in determining assistance payments" (Supp. App. 13a). It also concluded that "the agency charged with the administration of this statute has long regarded it as dealing with net income exclusively" (*id.* at 15a). Accordingly, the court held that mandatory payroll deductions are not within the "income" the states must consider under Section 402(a)(7). That holding, however, ignores the legislative history and administrative practices it purports to implement.

Because the court of appeals' decision relies so heavily upon its strained construction of the legislative and administrative history of Sections 402(a)(7) and (8), a somewhat extended examination of the background of both sections is necessary at this point.

1. In its earliest formulation, Section 402(a)(7) required state agencies to "take into consideration any * * * income and resources of any child claiming aid to dependent children." Social Security Act Amendments of 1939, ch. 666, § 401(b), 53 Stat. 1379-1380. The section was passed as an amendment to the Social Security Act of 1935, which as originally enacted did not require the states to decrease the size of AFDC grants paid to needy families with other income sources. See *Social Security: Hearings Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 2254 (1939) (Social Security Act Amendments of 1939) (colloquy between Rep. Duncan and Arthur Altmeyer). The 1939 amendment resolved the possible problem of overpayment under the 1935 Act, but in turn created another difficulty, because "families with working members incurred certain employment-related expenses that reduced available income but were not taken into account by the States in determining eligibility for AFDC assistance." *Shea* v. *Vialpando*, 416 U.S. 251, 259 (1974).

The Social Security Board, the federal entity then charged with administration of the AFDC program, sought to alleviate the inequities created by the 1939 amendment by encouraging the states "to allow credit for work-related expenses." *Shea*, 416 U.S. at 259. See Section 3140 of the HEW Handbook of Public Assistance Administration, Part IV (1957) (permitting states to allow a reasonable credit for work expenses when there is a determination that such expenses in fact exist); Bureau of Public Assistance, Federal Security Agency, Social Security Board, State Letter No. 4 (Apr. 30, 1942) (J.A. 25) (Executive Director of Social Security Board encourages state agencies to recognize that "when a person is working there may be additional needs which must be met"). The Board also instructed the states that income should not be counted in determining need unless it was actually available to an AFDC applicant. Thus, the states were prohibited from considering as a resource

those "sources from which income, contributions, maintenance, or support are not in fact available and forthcoming." *Guide to Public Assistance Administration*, Section 202, at 1-2 (1942) (J.A. 23).[7]

The treatment of work expenses in the calculation of AFDC benefits, however, ultimately was not left to administrative discretion. In 1962, Congress addressed the "work expense" quandary by amending Section 402(a)(7). That amendment, which "made mandatory the widespread but then optional practice of deducting employment expenses from total income in determining eligibility for assistance" (*Shea*, 416 U.S. at 260), required the states to consider, in addition to "income and resources," all "expenses reasonably attributable to the earning of any such income." Public Welfare Amendments of 1962, Pub. L. No. 87-543, § 106(b), 76 Stat. 188.[8]

The next important change in the AFDC statute came as a result of the Social Security Amendments of 1967, Pub. L. No. 90-248, § 202(b), 81 Stat. 881. Although Section 402(a)(7)'s directive regarding expenses reasonably related to the earning of income was not altered, Congress made that directive subject to the provisions of a new section, Section 402(a)(8), 42 U.S.C. 602(a)(8). That section created several new deductions (or "disregards") from "earned income" that were designed to encourage AFDC grant recipients to seek employment.

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[7] This 1942 policy is now codified at 45 C.F.R. 233.20(a)(3)(ii)(D), which provides that income is considered "available" to an AFDC recipient "both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance."

[8] As of 1962, therefore, AFDC benefits were calculated by comparing the total income and resources of a family, as reduced by the expenses reasonably related to the earning of that income, with a state's standard of need. Unless the AFDC grant was thereafter limited by application of a state level of benefits cap, no other steps were involved.

One such "work incentive" required state agencies to disregard, with respect to any month, the first $30 of "earned income" plus one-third of the remainder (81 Stat. 881); another required the states to disregard the "earned income" of full-time students (*ibid.*); a third permitted income to be set aside for the future needs of a dependent child (*ibid.*).

Pursuant to 42 U.S.C. (Supp. V) 1302, the Secretary of Health, Education, and Welfare (the agency then administering the AFDC program) thereafter issued regulations defining the term "earned income" in Section 402 (a)(8) and incorporating the "earned income" disregards of the section into the AFDC benefit calculation. The definition of "earned income," which has remained essentially unchanged since its original promulgation in 1969, was derived from a definition appearing in the Assistance Payments Administration, HEW, *Handbook of Public Assistance Administration* (Mar. 24, 1962). The regulation provided that "earned income" is gross income—the "total amount [of wages or salary], irrespective of personal expenses, such as income tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers." 45 C.F.R. 233.20(a)(6)(iv).[9]

A second regulation established the order in which the new disregards of Section 402(a)(8) would be applied. The disregards would be "deducted from gross income rather than from net income," and after that deduction "the amount allowed for work expenses" would be subtracted. Notice of Final Policies and Requirements, 34 Fed. Reg. 1394 (1969). See also 45 C.F.R. 233.20(a)(7)(i) (codifying the preceding sequence of calculations). Most important for present purposes, these regulations "permitted income tax withholdings to be deducted from gross income, but they did so by grouping that deduction together with deductions for all other work-related expenses, including lunches, transportation and the like" (*James* v. *O'Bannon*, 715 F.2d at 804).[10]

Because of the growing complexity of the process by which AFDC eligibility and benefits were determined, the states began experimenting with various ways of simplifying administrative procedures. The principal device utilized by the states during this period was the imposition of a flat deduction for certain work expenses. Although the specifics of the various state plans differed,[11] there was impressive unanimity on one point: by 1972 virtually every state in the nation considered mandatory

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[9] The 1962 *Handbook* definition was apparently drafted to implement an "earned income" disregard applicable to recipients of aid to the blind. The *Handbook* defined "earned income" as "the total amount [of wages or salary], irrespective of personal expenses such as income-tax deductions, lunches, and transportation to and from work" (Assistance Payments Administration, HEW, *Handbook of Public Assistance Administration*, Section 3162.2 (Mar. 24, 1962)).

[10] As a result of the 1967 amendments to the AFDC statute, the benefit calculation process proceeded in three steps: (1) the state considered the recipient's total income and resources, (2) it then deducted from the recipient's "earned income" the various disregards provided by Section 402(a)(8), and (3) finally, the state deducted the expenses reasonably attributable to the earning of income under Section 402(a)(7). The AFDC benefit calculation was more finely tuned than when the program was originally enacted in 1935—but it was also considerably more complex.

[11] A study conducted by the Department of Health, Education, and Welfare in late 1971 and early 1972 disclosed that four states (Arizona, Arkansas, Colorado and Vermont) "either allowed a flat amount to be disregarded for mandatory tax withholdings, or else included mandatory tax withholdings within an overall flat sum disregard" (*Jones* v. *O'Bannon*, 715 F.2d at 806-807). See J.A. 47-51, 52-53. A fifth state (Florida) placed a 7½ cap on the amount of mandatory tax withholding that could be deducted as "work expenses" (J.A. 47, 52). The remainder of the states permitted AFDC recipients to deduct the full amount of specified mandatory payroll deductions—including income and social security taxes—as expenses reasonably attributable to the earning of income (J.A. 47-52, 53-58).

payroll deductions for income and social security taxes to be "expenses reasonably attributable" to the earning of income within the meaning of the then-current version of Section 402(a)(7) (76 Stat. 188).[20]

State attempts to simplify the consideration of "expenses reasonably attributable" to the earning of income were challenged in court. In *Shea* v. *Vialpando*, this Court concluded that Section 402(a)(7) did not permit a state to substitute a flat deduction for such expenses, but rather required individual computation (416 U.S. at 264-265). The decision of the Court, however, "treated tax withholdings no differently than other work related expenses" (*Jones* v. *O'Bannon*, 715 F.2d at 796-797). In-

[20] In response to the movement among the states to standardize work expenses, the Department of Health, Education, and Welfare conducted orientation sessions on the treatment of such expenses for its Regional Offices in the late summer of 1971. Following those sessions, the Department analyzed the various items recognized by the states as expenses reasonably attributable to the earning of income. That study (J.A. 43-63) showed that, despite some variations in methodology (see note 11, *supra*), 48 of the 50 states, as well as the District of Columbia, classified mandatory withholdings for income and social security taxes as expenses reasonably attributable to the earning of income within the meaning of Section 402(a)(7) (76 Stat. 188). The practice of two states (Alabama and Maryland) regarding the treatment of mandatory payroll deductions was not analyzed in the study because state procedures were "[n]ot identifiable from State agency plan material in central office" (J.A. 47, 48).

As a result of this study, an internal agency memorandum suggested that the Department should develop a national standard for expenses of employment. The memorandum, which is reprinted as a supplemental appendix to this brief, suggested that (Supp. App. 87a-88a):

> as a minimum, a State agency must recognize the following as expenses reasonably attributable to the earning of income:
>
> Mandatory Payroll Deductions
> Transportation
> Personal Expenses, including lunches
> Tools, Uniforms and other such needs
> Child Care

deed, in line with the universal practice of the states at the time the case was decided, *Shea* repeatedly listed "mandatory payroll withholdings" as "expenses reasonably attributable to the earning of income" within the meaning of Section 402(a)(7) (416 U.S. at 254, 255).[21]

It was against this background that Congress passed the Omnibus Budget Reconciliation Act in 1981. The Senate Report on OBRA noted that "the current earned income disregard provisions have resulted in serious problems" (S. Rep. 97-139, 97th Cong., 1st Sess. 501 (1981)). Among these problems was the fact that, "[b]ecause Federal law neither defines nor limits what may be considered a work-related expense, there is now great variation among the States and many instances of abuse" (*ibid.*). Additionally, the "requirement for itemization of individual work expenses" that was explicated in *Shea* "has resulted in administrative complexity and error" (*id.* at 501-502). Finally, the Senate Report noted that, under the existing AFDC provisions, "families may remain on welfare even after they are working full time at wages well above the State welfare standard" (*id.* at 502). OBRA amended Sections 402(a)(7) and (8) to deal systematically with these difficulties.

The first two problems identified by Congress—uncertainty regarding what constitutes a work-related expense and the administrative burden associated with individualized computation of those expenses—were alleviated by deleting Section 402(a)(7)'s requirement that the states consider expenses "reasonably attributable" to the earning of income, and substituting in its place flat $75 work expense and $160 child-care disregards in Section 402(a)(8). 42 U.S.C. (Supp. V) 602(a)(7), (a)

[21] *Shea* also cited with approval (416 U.S. 253-254 n.3) the Second Circuit's opinion in *Connecticut Dep't of Public Welfare* v. *HEW*, 448 F.2d 209, 216 (1971). That case interpreted the Secretary's regulations governing Section 402(a)(7) (76 Stat. 188) as requiring the deduction of "personal expenses such as income-tax deductions" (448 F.2d at 216).

(8). These changes, which were provided "in lieu of itemized work expenses" (S. Rep. 97-139, *supra*, at 435), were made to free state agencies from the burden of computing work expenses on an individualized basis and to eliminate any uncertainty regarding whether particular items were in fact deductible as work expenses. *Id.* at 502. See also H.R. Conf. Rep. 97-208, 97th Cong., 1st Sess. 978-979 (1981).

The third problem noted by the Senate Report was addressed by altering the application of the "work incentive" disregards enacted in 1967. Because the "work incentive" disregards had not in fact resulted in AFDC recipients attaining "self sufficiency" (S. Rep. 97-139, *supra*, at 502), Congress determined to try another means to achieve that goal. Accordingly, OBRA restricted the availability of the "$30 and one-third" disregard to the first four months "in which a welfare recipient is employed" (*ibid.*) and altered the sequence in which the "work incentive" disregard would be calculated (H.R. Conf. Rep. 97-208, *supra*, at 978-979).[20] Congress then coupled these changes with "provisions * * * aimed at providing employment for AFDC recipients" (S. Rep. 97-139, *supra*, at 502-503). See pages 46-47, *infra*.

2. Considered in light of the foregoing chronology, respondents' construction of the legislative and administrative history of the AFDC statute simply does not withstand analysis. Indeed, the historical background just set forth refutes respondents' assertions, adopted by the court of appeals, that Section 402(a)(7) has always dealt only with net income (Supp. App. 13a), that the

[20] Prior to OBRA, the "$30 and one-third" disregard of Section 402(a)(8) was the first deduction made in the AFDC benefit calculation. As the court of appeals noted (Supp. App. 18a), this had the effect of increasing the size of the disregard, since it was calculated on the basis of an unreduced percentage of a recipient's total income. Following OBRA, the disregard is calculated after the $75 work expense and $160 child-care expense disregards have been subtracted. H.R. Conf. Rep. 97-208, *supra*, at 979. See 45 C.F.R. 233.20(a)(11).

section has been consistently so construed by the Secretary (*id.* at 15a), and that nothing in OBRA alters this result (*id.* at 17a-25a).

a. The court of appeals' finding (Supp. App. 13a) that Section 402(a)(7), since its enactment in 1939, has required the states to disregard mandatory payroll withholdings is plainly wrong. It ignores the context in which Congress was acting in 1939, as well as the subsequent legislative modifications of Section 402(a)(7).

In 1939, Congress could not have intended the states to consider only income net of mandatory tax withholdings in determining assistance payments under Section 402(a)(7) for the simple reason that mandatory payroll withholdings for federal income taxes did not begin until 1943. *See Bell* v. *Hottleman*, 168 F. Supp. 386, 391 n.7 (D. Md.), aff'd 721 F.2d 181 (4th Cir. 1983), petition for cert. pending, No. 83-6269. Although nominal withholdings for social security taxes began as early as 1937, "such mandatory payroll deductions were not generally encountered in 1939, especially not by welfare recipients" (*ibid.*). Thus, it is quite unlikely that Congress even considered—let alone provided for—the deduction of mandatory payroll withholdings when it enacted Section 402(a)(7) in 1939. The court of appeals' contrary conclusion is simply not supported by any credible evidence.[21]

[21] The court of appeals stated that, in the legislative debate preceding the enactment of Section 402(a)(7) in 1939, "concern was expressed that the needy not be penalized through inclusion in their income of sums not actually available to them" (Supp. App. 13a) (citing *Social Security: Hearings Before the House Comm. on Ways and Means*, 76th Cong., 1st Sess. 2254 (1939) (Amendments Act of 1939) (testimony of Arthur Altmeyer); 84 Cong. Rec. 6851 (1939) (remarks of Rep. Fenge)). The debate on Section 402(a)(7) did evidence such concern—but that concern had very little to do with the concept of mandatory payroll deductions.

In imposing, for the first time, a requirement that the states consider the income and resources available to AFDC applicants in determining need, Congress wanted to make certain that the states would not include in the benefit calculation future or potential

Indeed, if the 1939 legislation in fact reflected Congress's desire that only those resources "actually available for its use" be "counted against a family" (Supp. App. 11a), there would have been no need to amend Section 402(a)(7) in 1962 to provide for expenses "reasonably attributable" to the earning of income. 76 Stat. 188. Such expenses, under the court of appeals' rationale, would have been automatically deducted under Section 402(a)(7) because they were not "available" to the family. Congress, however, apparently did not agree with this interpretation of Section 402(a)(7), inasmuch as it explicitly amended the section to reach the result already obtained under the court of appeals' construction of the statute.

In order to avoid the difficulties that the 1962 amendment to the Social Security Act creates for its reading of Section 402(a)(7), the court of appeals noted that, "[t]o the legislative history of the 1962 amendment, which first brought 'work related expenses' into AFDC law, there is no reference to mandatorily withheld taxes as work-related expenses" (Supp. App. 26a). The court similarly

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source of income. Accordingly, the materials cited by the court of appeals deal not with congressional concern regarding the treatment of earned income by AFDC recipients, but rather with state consideration of resources that might be available to such recipients from friends and relatives. *See Social Security: Hearings Before the House Comm. on Ways and Means*, *supra*, at 2254 (testimony of Arthur Altmeyer) ("[t]here is a distinction * * * between requiring that relatives support and requiring that when relatives do support a person that the actual amount of that support be taken into consideration"); 84 Cong. Rec. 4861 (1939) (remarks of Rep. Fenger) ("[n]o law under which the Texas old-age assistance program was developed contained no reference to the ability of children to support an applicant, but this item soon became the chief object of the case workers' investigations"). The fact that Congress expressed its view that the states should not consider potential income from friends and family as a resource under Section 402(a)(7) thus has no bearing on the decidedly different question of how the earned income of an AFDC recipient should be regarded by the states.

tried to evade the conceptual difficulties posed by the 1981 deletion of the "work expense" deduction by claiming that, at least prior to 1974, mandatory payroll deductions were not routinely considered work expenses (*id.* at 27a-28a). Neither observation blunts the plain force of the 1962 and 1981 legislative actions.

The fact that Congress did not include mandatory payroll deductions on some "master work expense list" buried in a 1962 legislative report does not, of course, demonstrate that such deductions were not in fact work expenses within the meaning of amended Section 402(a)(7).[16] And, whatever the practice of the Secretary and the states regarding the treatment of work expenses following the 1939 amendment,[17] by the time this Court ren-

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[16] In any event, 42 U.S.C. (Supp. V) 1302 "vests the Secretary with extensive power to promulgate regulations in order to assure efficient administration of AFDC" (*James* v. *O'Bannon*, 715 F.2d at 806). In light of the fact that the Secretary exercised this " 'broad rulemaking power' to classify withheld taxes as work expenses," the Third Circuit concluded that "it is a strained reading of the 1962 legislative history to argue that, because tax withholdings were not specifically mentioned, Congress intended that they not be included within the category of 'any work expenses reasonably attributable to the earning of income' " (*ibid.* (quoting *Arizona Dep't of Public Welfare* v. *HEW*, 449 F.2d 456, 468 (9th Cir. 1971)).

[17] On the basis of administrative materials prepared prior to the 1962 amendment to Section 402(a)(7) (Section 3140 of the HEW Handbook of Public Assistance Administration, Part IV (1957); Bureau of Public Assistance, Federal Security Agency, Social Security Board, State Letter No. 4 (April 30, 1942) (J.A. 24); HEW, Public Assistance Report No. 48, *State Methods for Determining Need in the Aid to Dependent Children Program*, at 25 (Mar. 1961)), the court of appeals concluded that, prior to the 1962 amendment, "neither the states nor the agency regarded mandatory payroll deductions as work expenses" (Supp. App. 21a). But, although none of the administrative materials cited by the court explicitly refers to mandatory payroll deductions as "work expenses," they hardly support the court of appeals' conclusion that such deductions were not considered work expenses.

For example, although the 1961 HEW report relied upon by the court of appeals did find that, during the months of May, June and

dered its decision in *Shea* it was clear that mandatory payroll deductions were treated as work expenses by virtually every state. *Shea*, 416 U.S. at 254-255; J.A. 47-53. See pages 19-20, *supra*. If, in enacting OBRA, Congress was perceptive enough to note the "great variation" among the states as to "what may be considered a work-related expense" (S. Rep. 97-139, *supra*, at 501), it was certainly aware of the single item of work expenses that was recognized by all the states: mandatory payroll deductions.[18] Thus, in 1981, when Congress provided Section 402(a)(8)'s flat $75 work expense disregard "in lieu of itemized work expenses" under Section 402(a)(7) (S. Rep. 97-139, *supra*, at 435), it certainly knew that at least one category of work expenses—mandatory payroll deductions—would be affected by its actions.[19]

July 1959, the states studied were equating "gross income" with "take-home pay," that fact does not demonstrate that payroll deductions were not considered "work expenses" by those states. Rather, because the AFDC statute at the time did not explicitly recognize any deduction for "work expenses," the states' equation of "gross income" with "take-home pay" is readily explained as an effort, using imprecise terminology at a time when the terminology made no difference, to consider legitimate work expenses—in this case, mandatory payroll deductions—in the calculation of AFDC benefits.

[18] Indeed, during the legislative hearings prior to the enactment of OBRA, witnesses before various committees in both Houses of Congress identified mandatory payroll withholdings as "work expenses" that would be affected by the proposed legislation. See, *e.g.*, *Spending Reduction Proposals: Hearings Before the Senate Comm. on Finance*, 97th Cong., 1st Sess., Pt. 1, at 227 (1981) (testimony of Marian Wright Edelman, Children's Defense Fund) ("The Administration would set standard caps on work expenses of $75 per month for work expenses (tax, transportation, uniforms, supplies, etc.) and $50 per month per child for day care. These caps do not reflect the real cost of working"); *Budget Issues for Fiscal Year 1982: Hearings Before the House Comm. on the Budget (Vol. 1)*, 97th Cong., 1st Sess. 419-420 (1981) (document appended to testimony of Marian Wright Edelman) (pending proposals would limit the amount of work-related expenses a parent can claim "by setting a standard maximum deduction for these costs regardless of whether actual expenses incurred were greater. Currently, a working parent can deduct all actual work-related expenses (such as transportation, child care, supplies, and taxes) from earned income before her AFDC eligibility and grant levels are calculated"); *Administration's Proposed Savings in Unemployment Compensation, Public Assistance, and Social Services Programs: Hearings Before the Subcomm. on Public Assistance and Unemployment Compensation of the House Comm. on Ways and Means*, 97th Cong., 1st Sess. 88-89 (1981) (testimony of Christine Pratt-Marston, National Anti-Hunger Coalition) ("In place of the current system, which encourages AFDC women to take low paying jobs by recognizing that even those jobs involve costs, the Reagan Administration proposes to operate AFDC in a world which does not exist, that is, a world in which full time day care can be purchased for $50 a month, and in which the combination of Social Security and FICA taxes, transportation, and uniforms or other mandatory payroll deductions will never exceed $75 a month") (hereinafter cited as *House Hearings*).

The court of appeals dismissed the above legislative history as "weak evidence" of congressional intent (Supp. App. 24a). However, even if the statements of witnesses before congressional committees prior to the passage of legislation are not conclusive on the question of legislative intent (see 2A C. Sands, *Sutherland Statutory Construction*, § 48.10 (4th Ed. 1973)), they do illustrate the operative facts that were before the legislature. This Court has recognized that legislative reports must be "read in conjunction with the hearings conducted by the relevant House and Senate Committees" (*Federal Open Market Committee* v. *Merrill*, 443 U.S. 340, 357 (1979)). The Court, therefore, has repeatedly cited statements made during congressional hearings as evidence of legislative intent. See, *e.g.*, *Grove City College* v. *Bell*, No. 82-792 (Feb. 28, 1984), slip op. 7 n.11, 12-13 n.19; *United States* v. *Weber Aircraft Corp.*, No. 82-1616 (Mar. 20, 1984) slip op. 10 & n.22; *Kosak* v. *United States*, No. 82-618 (Mar. 21, 1984) slip op. 10-11 n.17.

In this case, the testimony offered during the congressional hearings "seem[s] merely to highlight what appears to be clear, though warmly debated, legislative and regulatory history" (*Bell* v. *Hettleman*, 558 F. Supp. at 396 n.16). Accordingly, the probative value of the statements dismissed by the court of appeals is plain: Congress, like the witnesses who appeared before it, operated under the assumption that mandatory payroll deductions were "work expenses."

[19] Congressional action since the OBRA amendments in 1981 reinforces the above conclusion. While considering a bill to restore the AFDC work incentives removed by OBRA, the House Ways and

The court of appeals' construction of the legislative history behind Section 402(a)(7) boils down to a rather remarkable syllogism: In 1939 Congress intended mandatory payroll withholdings to be excluded from income under Section 402(a)(7), even though such withholdings were nonexistent at the time. Accordingly, when Congress amended Section 402(a)(7) in 1962 and 1981 first to create and then to abolish the deduction of expenses reasonably attributable to the earning of income, the treatment of mandatory payroll withholdings was not affected because such deductions were "non-income items" rather than "work expenses." Therefore, because Congress did not specifically state in 1962 what it could not have meant in 1939 (*i.e.*, that income tax and social security deductions were "work expenses" that should be excluded under Section 402(a)(7)), Congress did not mean what it said in 1981. Such a novel reading of the 45-year history behind Section 402(a)(7) cannot be correct.

b. In the court below, respondents sought to bolster their argument that Section 402(a)(7) requires the states to consider mandatory payroll deductions when calculating AFDC benefits by relying on past administrative

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Means Committee noted (H.R. Rep. 97-587 (Pt. 1) 97th Cong., 2d Sess. 12 (1982) (emphasis added)):

> *Prior* to Federal amendments enacted in the 1960's, if an AFDC parent took a job, the family's AFDC benefits were reduced *dollar-for-dollar* by the amount of any earnings. In other words, there was no net financial gain from working. Furthermore, *any work-related expenses—such as transportation and child day care costs, and mandatory tax and other wage deductions—could result in the family actually having less net or disposable income than if the parent did not work.*

The House Ways and Means Committee, therefore, was fully aware in 1982 that mandatory payroll deductions were "work-related expenses." It is unlikely that this fact escaped those same legislators in 1981. See S. Rep. 97-209, 98th Cong., 1st Sess. 167-168 (1983) (projected cost savings for OBRA were calculated on the assumption that the only deductions from gross income would be the various disregards of Section 402(a)(8)).

practice. The court of appeals accepted this submission, finding that "the agency charged with the administration of [Section 402(a)(7)] has long regarded it as dealing with net income exclusively" (Supp. App. 15a). The court's reading of the administrative implementation of Section 402(a)(7), however, is no more accurate than its interpretation of the statute's legislative history.

The court of appeals noted that, soon after Section 402(a)(7) was enacted in 1939, the "Social Security Board adopted a policy statement providing that § [4]02(a)(7)(A) income must 'actually exist' and be 'available to the applicant'" (Supp. App. 13a). See J.A. 17-26. This policy has been continuously implemented by the agencies administering the AFDC program (see *Lewis* v. *Martin*, 397 U.S. 552, 555 (1970)) and is currently reflected in a regulation published at 45 C.F.R. 233.20(a)(3)(ii)(D). But, despite the lower court's reliance on the "availability" concept embodied in Section 233.20(a)(3)(ii)(D), the regulation—and the policy behind it—were never intended to control the treatment of mandatory payroll withholdings in the computation of AFDC benefits.

The 1940 policy statement regarding "availability" (Supp. App. 13a) was adopted immediately following the enactment of Section 402(a)(7) to prevent overly harsh application of the new requirement that states consider the "income and resources" of an AFDC applicant (53 Stat. 1379-1380). The policy, however, was plainly not addressed to mandatory payroll withholdings (which, as noted earlier, did not even exist to any appreciable degree in 1940). Rather, the "availability" policy was designed to prevent state agencies from considering as "income" certain property or relationships (such as family and friends) from whom no income would, in fact, be forthcoming.[20] The "availability" concept relied upon by

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[20] The most significant language in the 1940 policy statement cited by the court of appeals is found in paragraphs (a) and (b) of that document (Supp. App. 14a n.8 (emphasis added)):

the court below has never controlled the treatment of mandatory payroll withholdings in determining AFDC eligibility and benefits, and 45 C.F.R. 233.20(a)(3)(ii)(D) has never been so applied by HHS or any predecessor agency.[29]

Ultimately, the "availability" theory propounded by respondents and adopted by the court of appeals must be rejected because it sweeps too broadly. If income tax and social security withholdings must be deducted from an AFDC recipient's "income" under Section 402(a)(7) because such sums are not "available" to meet other living expenses, there is no reason not to deduct other work-related expenses as well. Sums expended for uniforms, transportation to work, cafeteria lunches, union dues and gifts for departing co-workers are all "expenses" incurred as a result of employment that are not otherwise "available" for living expenses. In short, the "availability" theory sweeps all work-related expenses within its scope, and in the process obliterates Congress's expressed desire in 1981 to provide a flat "work expense" disregard in place of an itemized work expense deduction. S. Rep. 97-139, *supra*, at 435.

The court of appeals, in apparent recognition of this fact, limited its holding to state and federal income taxes

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(a) The income or resource shall actually exist. *Attributing a definite amount of income to sources or to kinds of property that produce either no income or less than the amount attributed to them is fictitious* and such an imputed amount cannot properly be considered as an actual resource.

(b) The income or resource shall be available to the applicant. To be regarded as available, an income or resource must be actually on hand or ready for use when it is needed. *Consideration does not mean attributing a resource to sources from which income, contributions, maintenance, or support are not in fact available and forthcoming.*

[29] See *James* v. *O'Bannon*, 718 F.2d at 805 ("no cases decided prior to OBRA have been called to our attention holding or even suggesting that tax withholdings were deducted from gross earnings in order to satisfy the 'availability' theory upon which the plaintiffs rely").

that are deducted from an AFDC recipient's paycheck (Supp. App. 36a). But such a limitation is hardly a principled boundary within which to cabin the "availability" doctrine. As the First Circuit noted in *Dickerson* v. *Petit*, 728 F.2d at 25, "the time of payment seems to us but a superficial distinction; all necessary expenses must be met sometime." In addition, taxes are not the only expenses deducted from a worker's paycheck. Other expenses—such as union dues—are also deducted periodically from a worker's salary.

Moreover, the simple fact that certain sums are deducted from a worker's paycheck does not demonstrate that those funds are not "available" to the worker. In the case of union dues and mandatory payroll deductions, for example, the funds are "available" to the worker in a very real sense: the funds withheld are satisfying financial obligations incumbent upon union members and taxpayers. The "availability" theory adopted below, therefore, ignores economic reality. Mandatory payroll deductions are "available" to a worker for the obvious reason that they have been availed of to pay his debts.

In any event, if respondents and the court of appeals are correct that the "availability" theory controls the treatment of mandatory payroll withholdings, that conclusion leads to a most anomalous result: "during the period between 1967, when the "work incentive" disregards of Section 402(a)(8) were added to the AFDC statute, and the enactment of OBRA, the states erroneously deducted mandatory payroll deductions from an AFDC applicant's earned income in determining eligibility and benefits."[30] A hypothetical AFDC application, processed according to respondents' construction of pre-OBRA law, demonstrates why this is so.[31]

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[30] 45 C.F.R. 233.20(a)(3)(ii) (1979) provided that "net income * * * available for current use" shall be determined "after policies governing * * * disregard * * * have been * * * applied" (emphasis added).

[31] The example that follows is taken from the Third Circuit's opinion in *James*, 718 F.2d at 806.

If, as respondents argued successfully below, 45 C.F.R. 233.20(a)(3)(ii) (1970) required the states to deduct mandatory payroll withholdings as part of an "availability" determination, that determination could only have taken place *after* the disregards provided for by Section 402(a)(8) had been calculated. Prior to OBRA, therefore, the "$30 plus one-third" work incentive disregard of Section 402(a)(8) would have been the first deduction considered by the states.

Assuming that an applicant had an income of $900, the "work incentive" disregard of Section 402(a)(8) would have resulted in a deduction of $330 from the applicant's "earned income," leaving him with $570 in income to be "considered" by the state under Section 402(a)(7). Assuming further that the applicant had $125 in transportation, meal, and child care expenses, and another $25 in mandatory payroll withholdings, respondents' pre-OBRA construction of Section 402(a)(7) would have resulted in the following procedure: Because the $125 in transportation and other related expenses would be classified by respondents as expenses "reasonably attributable to the earning of income" (76 Stat. 188), that sum would have been deducted by the state, leaving the applicant with an "income" under Section 402(a)(7) of $445. According to respondents, the state would then have deducted the $25 in mandatory payroll withholdings under the "availability" concept of 45 C.F.R. 233.20(a)(3)(ii)(D), leaving the applicant with $420 in "income" under Section 402(a)(7). In truth, however, that mandatory payroll withholding deduction would not have been made.

Because the $330 "work incentive" deduction was made "*for computation purposes only*," that sum would have been, in fact, "available" to the AFDC recipient following the deduction of work-related expenses under Section 402(a)(7) (*James* v. *O'Bannon*, 715 F.2d at 806).

Therefore, when the state reached the point in the AFDC calculation process where mandatory payroll deductions would have been taken into account under the "availability" theory, the AFDC applicant would have had not $420 but $750 in income "actually available" for current use. 45 C.F.R. 233.20(a)(3)(ii) (1970). Since the "amount of monies remaining available to a beneficiary would not have been affected by tax withholdings, so long as those withholdings had been less than the amount of the work incentive disregard, * * * [such withholdings] would not be disregarded at all." *James* v. *O'Bannon*, 715 F.2d at 806.

The result set out above, of course, "was not the practice before OBRA" (*James* v. *O'Bannon*, 715 F.2d at 806). Furthermore, the universality with which mandatory payroll withholdings were disregarded from income prior to OBRA demonstrates that such withholdings were not processed under the administrative "availability" theory adopted below; rather, mandatory payroll withholdings were treated as "expenses reasonably attributable to the earning of * * * income" under Section 402(a)(7) (76 Stat. 188).[20]

Thus, there is no merit to the court of appeals' conclusion that the Secretary's position in this case—*i.e.*,

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[20] Respondents may well assert that the "availability" determination should be the first, not the last step, in the AFDC calculation process. Indeed, the court of appeals apparently adopted this view of the procedure. See Supp. App. 16a-17a. But, aside from the impossibility of determining what income is actually "available" to an AFDC recipient prior to applying the various disregards and deductions expressly provided by Congress, the contention founders on the plain language of 45 C.F.R. 233.20(a)(3)(ii) (income "actually available" to the applicant shall be determined "after all policies governing the reserves and allowances and disregard or setting aside of income and resources * * * have been uniformly applied"). Respondents cannot have it both ways—they cannot assert that mandatory payroll withholdings must be deducted because of an administrative "availability" policy, and then ignore the plain language of the regulation from which they drew that policy.

that OBRA modified the treatment to be accorded mandatory payroll withholdings by deleting Section 402(a)(7)'s work expense deduction—"is in flat contradiction with the regulatory interpretation of 42 U.S.C. § 602(a)(7) embodied in 45 C.F.R. § 233.20(a)(3)(ii)(D), which has been agency policy *for forty years*" (Supp. App. 25a-26a). The evident "agency policy *for forty years*" has been to treat mandatory payroll deductions as what they are—work expenses. Nor is there any merit to the lower court's assertion that the Secretary's position requires a court to assume that the OBRA Congress "chose to repeal *sub silentio* the 'income available' standard of the 76th Congress" (Supp. App. 29a). As the Third Circuit aptly noted, "there was quite simply no such standard with respect to tax withholdings to be overruled" (*James* v. *O'Bannon*, 715 F.2d at 807).

c. After examining the legislative history and administrative interpretation of Section 402(a)(7), the court of appeals proceeded to disagree with the Secretary's argument that, whatever the proper scope of the term "income" in that section, the "earned income" provisions of Section 402(a)(8) are applicable to this case and require rejection of respondents' contentions (Supp. App. 17a-23a). The court found that Section 402(a)(8) did not "control" the calculation of "income" under Section 402(a)(7) (Supp. App. 19a), that the concept of "gross income" had been given conflicting regulatory definitions (*id.* at 23a), and that, in any event, the Secretary's construction of Section 402(a)(8) was contrary to the legislative intent underlying the AFDC program (Supp. App. 25a). None of these assertions, however, rebuts the Secretary's reading of Section 402(a)(8).

The government's submission regarding the proper interpretation of Sections 402(a)(7) and (8) is simple and straightforward. Section 402(a)(7) requires the states to consider "any * * * income and resources" of an AFDC beneficiary in determining need "except as * * * otherwise provided in [Section 402(a)(8)]" (42 U.S.C. (Supp. V) 602(a)(7)). The provisions of Section 402(a)(8) apply specifically to "earned income." That term, given a natural reading, encompasses all income earned by an employee—including income deducted for mandatory payroll withholdings.[a] Thus, when considering the wages of an AFDC recipient in the calculation of statutory benefits, state welfare agencies must look to the provisions of Section 402(a)(8), not Section 402(a)(7). And Section 402(a)(8) provides a flat $75 work expense disregard from "earned income," which is to be taken "in lieu of itemized work expenses" (S. Rep. 97-139, *supra*, at 435).

The court of appeals rejected the above construction of Section 402(a)(8) based on a peculiar reading of 1981 congressional intent. Section 402(a)(8), as amended by OBRA, was not dispositive of this case, the court concluded, because "before 1981 § [4]02(a)(8) did not act in any way whatever as a substitution for or limitation on § [4]02(a)(7)" (Supp. App. 18a). In short, the court found that, because Section 402(a)(8) did not deal with or limit work expenses prior to 1981, the section did not deal with or limit them after OBRA. This conclusion simply ignores the clear language enacted by Congress in OBRA.

As the court below noted, "any reasonable expenses attributable to the earning of income were controlled by

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[a] There is nothing in the legislative history of Section 402(a)(8) to indicate that Congress intended the term "earned income" to be read in a way inconsistent with its plain language. Indeed, in another section of the Social Security Act, which deals with the Supplemental Security Income program, Congress specifically defined the term "earned income" as "wages," not "take-home pay." 42 U.S.C. 1382a(a)(1)(A). In any event, at the time Section 402(a)(8) was amended in 1981, the Secretary had long defined "earned income" for AFDC purposes as the "total amount [of wages or salary], irrespective of personal expenses, such as income-tax deductions" (45 C.F.R. 233.20(a)(6)(iv)).

§ (4)402(a)(7) from 1967 until 1981" (Supp. App. 19a). But, in 1981, Congress deleted the work expense provision from Section 402(a)(7) and substituted instead a flat $75 disregard in Section 402(a)(8). It is highly unlikely that, in doing so, Congress failed to recognize that Section 402(a)(8) would henceforth "control all calculations applying to earned income" (Supp. App. 19a).

At the time Congress acted in 1981, Section 402(a)(7) had long provided that its terms would govern unless "otherwise provided in [Section 402(a)(8)]" (42 U.S.C. (Supp. V) 602(a)(7)). Congress could hardly have been ignorant of this interplay between Sections 402(a)(7) and (8). Indeed, the OBRA Congress evidenced its awareness of how Sections 402(a)(7) and (8) interact by altering the order in which the Secretary, by regulation, had previously provided for the computation of the "earned income" disregards of Section 402(a)(8).[28] In sum, the facts that Section 402(a)(8) would thereafter control the treatment of work expenses formerly handled under Section 402(a)(7), and that such expenses would be deducted from "earned income" as defined by the Secretary, were hardly items that slipped by an unwary Congress.

Nor can it be presumed, as the court of appeals appears to suggest at one point (Supp. App. 24a-25a), that Congress was unaware that the work expense disregard

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[28] As discussed earlier (pages 19-20, supra), soon after Section 402(a)(8) was enacted, the Secretary promulgated regulations prescribing the order in which its "earned income" disregards would be computed. See Notice of Final Policies and Requirements, 34 Fed. Reg. 1004 (1969). Those regulations provided that the "$30 and one-third" work incentive disregard would be calculated before work expenses were deducted under Section 402(a)(7) (ibid.). OBRA specifically "change[d] the order" in which those calculations would be performed (H.R. Conf. Rep. 97-208, supra, at 972). Following OBRA, the "$30 and one-third" disregard is to be calculated after the work expense and child-care disregards are deducted from earned income (ibid.). See 45 C.F.R. 233.20(a)(3)(ii).

of Section 402(a)(8) would be taken from gross rather than net income. The court below asserted that, although the Secretary has defined "earned income" since 1969 as including "personal expenses * * * such as income-tax deductions" (45 C.F.R. 233.20(a)(6)(iv)), the regulation is not entitled to any particular deference in determining the proper construction of Section 402(a)(8) because "the term gross income has been differently defined at different times in the history of agency administration of AFDC" (Supp. App. 25a). The court's statement that the Secretary's "simple definition" of "earned income" is "inconsistent with earlier pronouncements," is wholly incorrect (ibid.).

The supposed "inconsistent" agency construction of gross income referred to by the court of appeals is a 1961 HEW Report which found that, during three months in 1960, certain states were equating "gross income" with "take-home pay." See note 17, supra. This report regarding the practice of state agencies is hardly convincing evidence of an inconsistent federal construction of the term "earned income." Moreover, as noted earlier, the report was prepared before there was any formalized deduction for work expenses in the AFDC statute, and the report's use of the phrases "gross" or "net" income therefore had no special significance to the computation of AFDC benefits.

Thus, neither the legislative or administrative histories of Sections 402(a)(7) and (8), nor the past administrative construction of the term "earned income," support the decision below. The real basis for the lower court's holding apparently lies elsewhere—in the notion that the government's interpretation of Section 402(a)(8) would "undermine[] the purposes of both OBRA and the AFDC Act" (Supp. App. 26a). It is to these congressional concerns, upon which the court of appeals "primarily" relied (id. at 8a), that we turn in the final section of this brief.

C. Inclusion Of Mandatory Payroll Deductions Within The Flat $75 Work Expense Disregard Enacted By OBRA Is Entirely Consistent With The Congressional Policies Underlying The AFDC Program

The court of appeals noted that "legislative and administrative histories are usually pursued in an effort to ascertain something more important, the purpose of Congress in enacting a specific piece of legislation" (Supp. App. 29a). Therefore, after addressing the legislative and administrative background of Sections 402(a)(7) and (8), the court devoted the last section of its opinion to an extensive analysis of the congressional policies underlying the AFDC program (Supp. App. 29a-36a). The court found that those policies required it to reject the Secretary's construction of OBRA.

The court of appeals first assumed that "'[t]he primary purpose of the OBRA amendments to the AFDC program is to reduce or eliminate welfare benefits for those considered by Congress to be less needy than those completely without resources—persons or households that have available other sources of income or resources with which to support themselves'" (Supp. App. 30a) (quoting *Philadelphia Citizens in Action* v. *Schweiker*, 669 F.2d 877, 879 (3d Cir. 1982)).[37] The court found that

[37] The court of appeals noted that the Third Circuit rendered the above description of the legislative goals underlying OBRA "[w]ithout citation of authority" (Supp. App. 30a). There is, of course, plentiful authority for the Third Circuit's statement. See, e.g., S. Rep. 97-139, supra, at 2 (purpose of OBRA is "to maintain Federal spending"); id. at 368 (OBRA amendments to the AFDC program are designed to alleviate a "serious problem" under prior law; i.e., that "families may remain on welfare even after they are working full time at wages well above the State welfare standard"); House Hearings 10-11 (testimony of Secretary Schweiker) (AFDC proposals "are designed to improve the program by: Limiting eligibility to those most in need; Strengthening work requirements; Making AFDC a temporary safety net for those who are not economically independent; Emphasizing individual responsibilities; and Improving administration").

its reading of OBRA accomplished that purpose, because it in fact resulted in reducing the size of the pre-OBRA AFDC grant of one of the respondents.[38]

The court of appeals then noted that an underlying goal of the AFDC program is to help "'parents * * * attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection'" (Supp. App. 29a (quoting 42 U.S.C. 601)). This statutory language, the court stated, "stands today" (Supp. App. 29a). And, on the basis of that language, the court rejected the Secretary's construction of OBRA because it resulted in a financial disincentive to employment.[39] The court concluded that if it was "to give any meaning at all to the purposive language which remains within the AFDC Act," respondents' method of calculating income under Section 402(a)(7) "is required" (Supp. App. 33a).

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[38] The court utilized the income of one of the respondents, Catherine Bass, to illustrate its conclusion. It found that, prior to OBRA, Bass would have received a $331 "financial incentive" for retaining her employment (the "financial incentive" represents the difference between the AFDC grant Bass "would have received * * * for doing nothing and the grant she would have received under pre-OBRA law if she retained her employment") (Supp. App. 31a-32a (emphasis in original)). The court found that, under respondents' method of considering "income" in the calculation of AFDC benefits, the "financial incentive" disappears, and Bass would receive "$106 less a month" for working "than she would receive for staying at home" (*id.* at 32a). Under the Secretary's construction of Sections 402(a)(7) and (8), Bass's grant would be reduced even further. The court found that if Bass's $84 in mandatory payroll withholdings were not excluded from income under Section 402(a)(7), it would "cost" her "$189 monthly to go to work" (Supp. App. 32a).

[39] As noted in the previous footnote (note 28, *supra*), even respondents' method of calculating AFDC benefits under OBRA results in a reduction of benefits to recipients with earned income. The court nevertheless concluded that respondents' construction of OBRA is preferable to the Secretary's reading of the Act because respondents' "method of calculation provides less of a disincentive to work than does that advanced by the government" (Supp. App. 33a) (emphasis in original).

The court of appeals' analysis of congressional purpose, like its analyses of the legislative and administrative histories of Sections 402(a)(7) and (8), is unfairly selective. The decision fails to give full scope to the benefit reductions envisioned by Congress, and disregards the "new course" set by that body in 1981 (*James* v. *O'Bannon*, 715 F.2d at 809). As the First Circuit recently remarked, "OBRA clearly placed cost-cutting ahead of the previously oft-enunciated goal of minimizing work disincentives." *Sweeney* v. *Murray*, No. 83-1738 (Apr. 27, 1984), slip op. 14 n.11.

The method of calculating AFDC benefits adopted by the court of appeals does, indeed, reduce the size of some AFDC grants for recipients with earned income. It does not, however, result in the full savings contemplated by Congress at the time OBRA was enacted. The Congressional Budget Office calculated that adoption of the flat $75 work expense disregard included in OBRA, along with related changes, would reduce federal AFDC expenditures by approximately $206 million dollars in fiscal year 1982 (S. Rep. 97-139, *supra*, at 447, 552).[39] That estimate was made on the assumption that the work expense disregard would be deducted from *gross* income.[40]

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[39] The projected savings for subsequent years was comparable. S. Rep. 97-139, *supra*, at 552 (projecting savings of $212 million in 1983, $218 million in 1984, $222 million in 1985, and $226 million in 1986).

[40] The Congressional Budget Office reported that its estimate was based on the following assumption (S. Rep. 97-139, *supra*, at 552): "The provision to limit the earnings disregard would standardize the work expense at $75 per month prorated for part-time or part-month work, cap child care expenses at $160 per month per child, and apply the disregards in the following order: 1) flat $30; 2) $75 (or prorated amount); 3) child care expenses; and 4) one-third of the remaining expenses." There is no indication that, as respondents would have it, the Congressional Budget Office even contemplated that mandatory payroll deductions were not a "work expense" within the proposed $75 disregard, or that the flat disregard would be subtracted in addition to mandatory payroll deductions. *See* J.A. 76 (affidavit of Linda S. McMahon) ("projected

HHS has estimated that, under the court of appeals' construction of Section 402(a)(7), those savings would be reduced by approximately $57 million. Thus, the position espoused by respondents would cut the projected savings of the flat $75 work expense disregard by over 25%.[40]

The most serious error committed by the court of appeals in the course of its discussion of congressional policy, however, was its refusal to enforce the plain language of OBRA because of the alleged financial disincentives inherent in such action. The court reasoned that, in restraining the growth of government spending, "the choice is not between making higher or lower benefit payments. * * * The choice is between working and not working. If the disincentive provided is strong enough, there is no reason to believe that AFDC recipients will work in order to pay handsomely for the privilege. If that eventuality materializes, the result of the statutory construction which the [state and federal] governments urge will

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cost savings for the earned income disregard provisions, which included the $75 work expense limit, were based on subtracting the disregard from gross rather than net income"). It should be noted that only a portion—estimated at approximately $100 million—of the $206 million in savings is directly attributable to the $75 standard work expense provision.

[40] The court of appeals was apparently undisturbed by the effect of its decision, because its limitation of the flat $75 work expense disregard did not negate the savings achieved by the "chief economizing feature" of OBRA, "the repeal of the old work incentive disregard" (Supp. App. 24a n.15). Aside from the fact that OBRA did not "repeal" the work incentive disregard, but merely limited its applicability, the lower court's ranking of the AFDC savings contemplated by OBRA is erroneous.

The Congressional Budget Office estimated that OBRA's restriction of the "$30 and one-third" disregard to the first four months of an AFDC applicant's employment would result in a savings of $168 million in fiscal year 1982 (S. Rep. 97-139, *supra*, at 447, 552). By comparison, the fiscal year 1982 savings estimated as a result of the new flat work expense cap were $206 million (*ibid.*). The work expense cap was also estimated to result in significantly greater savings than the limitation of the work incentive disregard through fiscal year 1986 (*id.* at 552). Thus, the work expense cap, rather than the "repeal" of the "old work incentive disregard," was the "*chief* economizing feature" of OBRA (Supp. App. 24a).

be a rise in government spending through increased welfare payments" (Supp. App. 33a-34a) (emphasis in original).

There is, of course, some force to the policy observations made by the court of appeals, and the merits of respondents' position are indeed worthy of debate. That debate, however, was settled against respondents when Congress enacted OBRA in 1981.

The legislative hearings, committee reports, and debates on the floor of Congress prior to the enactment of OBRA in 1981 demonstrate conclusively that the Senators and Representatives who voted to amend Sections 402 (a)(7) and (8) had heard arguments suggesting that they might be creating some financial disincentives to employment. On the first day of House hearings on the AFDC provisions of OBRA, the Secretary of Health and Human Services was greeted by Representative Stark, Chairman of the House Subcommittee on Public Assistance and Unemployment Compensation, with the observation that the proposed changes would result in giving a mother extra money for "quitting her job," thereby "setting up a situation in which it is irresponsible for a mother trying to feed her children to keep working" (*House Hearings* 3). Subsequent speakers before both House and Senate committees repeatedly noted the employment disincentives that, in their view, were inherent in the proposals pending before Congress,[29] and the re-

[29] See, *e.g.*, *House Hearings* 26 (remarks Rep. Rose) ("Are we in this particular program to include a disincentive for those individuals who are working poor, to say: Look, I cannot get those benefits that are just sufficient to help my children and family out. I can get all those benefits if I stop working and collect welfare"); id. at 41 (remarks of Rep. Rangel) ("What then are the probable consequences of the President's Program? * * * The marginally poor, actually penalized by the President's Program for working, would have a great disincentive to continue to work"); id. at 48 (remarks of Rep. Chisholm) ("Not only will the cumulative effect of the administration's proposals adversely impact upon needy recipients, but they may also act as disincentives for those individuals who are working, trying to become self-sufficient, but require some level of cash or medical assistance to supplement their income.

port of the Congressional Budget Office, which was included in the Senate Report, reiterated the possible crea-

* * * [Some] may actually find themselves better off if they stop working"); id. at 85 (remarks of Angela Somnowski, National Anti-Hunger Coalition) ("I would also like to say that the income disregard and the work-related expenses are also very important. If in fact, the proposed Reagan cuts on AFDC were enacted, then it would not pay for me to work. It would be, he in fact is providing incentive for me not to work, but he is providing incentive for me to remain on the welfare rolls"); id. at 88-89 (prepared statement of National Anti-Hunger Coalition) ("In place of the current system, which encourages AFDC women to take low paying jobs by recognizing that even those jobs involve costs, the Reagan Administration proposes to operate AFDC in a world which does not exist, that is, a world in which full time day care can be purchased for $50 a month, and in which the combination of Social Security and FICA taxes, transportation, and uniforms or other mandatory payroll deductions will never exceed $75 a month. Any working AFDC mother whose work-related expenses exceed these amounts will either have to absorb the costs out of minimum wage or lower earnings, or will have to quit working"); id. at 197 (remarks of Burt Seidman, American Federation of Labor) ("We oppose the Administration's proposal to reduce the amount of earnings disregarded when determining income to be counted in calculating benefits payable to AFDC recipients. * * * Not to deduct the actual cost of work-related expenditures in determining AFDC payments which working mothers are entitled would in many cases deprive the family of enough income on which to live and force Lynn to give up the wages from work and rely totally on welfare"); id. at 265 (statement of Albert P. Rosso, American Federation of State, County, and Municipal Employees) ("We strongly caution against the imposition of severe reductions of current, allowable disregards which would impact so adversely upon the working poor as to cause them—as a matter of economic survival—to abandon their work places and to rely totally on AFDC and other program benefits available to the poor"); id. at 314 (remarks of Rev. Timothy McDonald, Georgia Public Assistance Coalition) ("Furthermore, if employment is our goal, work related expenses must be used to encourage work, rather than as a disincentive to work"); id. at 318 (remarks of Kevin M. Aslanian, Welfare Recipients League, Inc.) ("[T]he current system barely helps AFDC recipients meet their work related expenses. To change the current system will only result in women being forced to make a choice between feeding their children or meeting their work-related expenses"); id. at 323 (prepared statement of Welfare Recipients League, Inc.) (the proposed

tion of financial disincentives found unacceptable by the court of appeals. S. Rep. 97-139, *supra*, at 552.[30]

Indeed, precisely because of the concerns ventilated by respondents in the district court and court of appeals, the

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$75 work expense cap "is unrealistic" and "will increase the caseload of nonworking welfare recipients"); *id.* at 551 (remarks of Nancy Duff Campbell, Women's Rights Project, Center for Law and Social Policy) (Congress is urged to reject Administration proposals "to ensure, first, through the disregard for work expenses, that recipients are not economically worse off by working, as they might be, for example, if they have child care costs or other work expenses that eat up most of their income"); *id.* at 559-560 (remarks of Elizabeth Wickenden, Consultant on Social Policy, New York, N.Y.) ("to place a limit on what may legitimately be spent for work-related expenses without reducing benefits is an open invitation to idleness. It is another Alice-in-Wonderland absurdity. What woman—with child care and other work expenses above the limit whatever it is to be—*is* going to endanger her children's welfare by going to work?"); *Spending Reduction Proposals: Hearings Before the Senate Comm. on Finance*, 97th Cong., 1st Sess., Pt. 1, at 218 (remarks of Marian Wright Edelman, Children's Defense Fund) ("We are concerned that many of the welfare proposals will be a disincentive for parents to work by cutting back the amount of allowable work expenses"); *id.* at 127 (prepared statement of Children's Defense Fund) ("The Administration would set standard caps on work expenses of $75 per month for work expenses (tax, transportation, uniforms, supplies, etc.) * * *. These caps do not reflect the real cost of working * * * [and may force mothers to] simply give up working"); *id.* at 289 (remarks of Robert E. McGarrah, American Federation of State, County and Municipal Employees) ("The proposed changes, we believe, will force many [parents] to give up work, and if they do, their children—will suffer the most").

We note that these dire predictions were repeatedly disputed by Administration spokespersons and Members of Congress, and have not proven correct. *See* GAO, *An Evaluation of the 1981 AFDC Changes: Initial Analysis* (Mar. 30, 1984).

[30] The Congressional Budget Office remarked that the $75 work expense cap and limitation on the applicability of the "$30 and one-third" disregard might "increase the work disincentives found in the current AFDC program. Currently, AFDC families, on the average, are able to retain about 50 percent of their earned income. Under the proposed changes, AFDC families would be able to retain only about 30 percent of their earned income" (S. Rep. 97-139, *supra*, at 552).

House Subcommittee on Public Assistance and Unemployment Compensation drafted a version of Section 402(a)(8) that would have substantially increased the flat work expense disregard of OBRA. The committee proposal allowing AFDC recipients to deduct, as work expenses, the lesser of 20% of their earned income or $175. 127 Cong. Rec. H3720 (daily ed. June 26, 1981). This version of Section 402(a)(8), however, was rejected on the floor of the House, and a substitute version of Sections 402(a)(7) and (8)—identical to the provision passed by the Senate (H.R. Conf. Rep. 97-208, *supra*, at 970-971)—was adopted by the House of Representatives. 127 Cong. Rec. H3926-H3927 (daily ed. June 26, 1981). Before that action was taken, strong statements were made on the floor of the House decrying the possible disincentives created by amended Sections 402(a)(7) and (8).[31] But, despite vigorous presentation of the same policy arguments accepted by the court of appeals, the AFDC pro-

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[31] 127 Cong. Rec. H3910-H3911 (daily ed. June 26, 1981) (remarks of Rep. Rostenkowski, Chairman of the House Committee on Ways and Means) (House committee proposals regarding Sections 402(a)(7) and (8) "are not as drastic or severe as the changes proposed by the administration" because the "committee was concerned that the administration's proposals would eliminate any financial incentive for single parents with children to remain in the workforce. For example, under the administration's bill, a California AFDC family of three, after the mother had been on the job for 4 months, would have disposable monthly income of $354. Whereas, a mother with the same number of children, but who didn't work, would have $379. Thus, the first family is penalized $144 per month for working"); 127 Cong. Rec. H3910-H3911 (daily ed. June 26, 1981) (remarks of Rep. Biaggi) ("In the area of the Aid to Families with Dependent Children—the substitute proposes to cut approximately $400 million from the program and will harshly penalize working poor families by reducing the percentage of earned income that beneficiaries can keep from 50 to 30 percent. This seems contradictory to a time when we are giving new thoughts to programs like workfare. This proposal may lead to welfare recipients quitting their jobs, thus adding to the overall cost of welfare").

posals contained in OBRA were adopted by the House of Representatives and subsequently enacted into law.

The OBRA Congress did not ignore the "purposive language which remains within the AFDC Act" (Supp. App. 33a). The AFDC program still has "encouraging self-sufficiency of AFDC recipients" as one of its "fundamental goal[s]" (*James* v. *O'Bannon*, 715 F.2d at 809). The OBRA Congress merely "abandoned the financial incentives approach which the 87th Congress had embraced" (*ibid.*).

The Senate Report on OBRA reflects congressional disillusionment with the use of financial incentives to promote employment of AFDC recipients. The Report found that, "despite the ["$30 and one-third"] work incentive and other amendments added to the law in an effort to increase employment," AFDC recipients have not "move[d] into employment" or "become self-sufficient" (S. Rep. 97-139, *supra*, at 502).[38] Thus, "[h]aving determined that providing financial incentives for work was not achieving the goal of self-sufficiency and that such incentives were leading to ever-increasing public expenditures, Congress embarked on a new course" (*James* v. *O'Bannon*, 715 F.2d at 809).

[38] The Report noted (S. Rep. 97-139, *supra*, at 502):

> The $30 and one-third disregard was added to the law in 1967 because it was believed that it would operate as an incentive for mothers to move into employment and to become self-sufficient. Statistics indicate that this has not been the case. For many years the Department of Health and Human Services (DHHS) has been conducting a survey of AFDC recipients which includes the question of employment status of mothers. Results of these surveys show that, despite the work incentive and other amendments added to the law in an effort to increase employment, the percentage of AFDC mothers who work has remained constant.
>
> According to the 1961 survey, 14.3 percent of AFDC mothers were working full or part time. In 1967, before the disregard provision was put into effect, the percentage had grown very slightly to 14.9 percent. In 1979, it dropped to 14.1 percent. DHHS statistics also show that under current law, AFDC mothers are not achieving the goal of self-sufficiency. Only about 8 percent of AFDC case closings are due to the earnings of the mother. (In California only about 2 percent of case closings are due to the mother's earnings, and in New York only about 3 percent are due to the mother's earnings.)

That "new course" was to establish various work programs designed "to improve the employability of participants through actual work experience" (42 U.S.C. (Supp. V) 609); to make jobs available "as an alternative to aid otherwise provided under the State plan" (42 U.S.C. (Supp. V) 614(a)); and to establish "work incentive demonstration program[s]" (42 U.S.C. (Supp. V) 645 (a)). The OBRA Congress concluded that these work programs, in combination with the benefit reductions of OBRA, "are expected to decrease welfare dependency, and emphasize the principle that AFDC should not be regarded as a permanent income guarantee" (S. Rep. 97-139, *supra*, at 502-503).

Accordingly, the goals underlying the AFDC program have not changed—just the means provided by Congress to achieve them. Although the policy concerns pressed by respondents and relied upon by the court of appeals are certainly not frivolous, it is simply "no longer possible to argue that interpretations of AFDC that create disincentives to employment must, because they have such an effect, be regarded as inconsistent with the purposes of the program" (*James* v. *O'Bannon*, 715 F.2d at 809-810). In sum, "Congress was aware of what it was doing" (*Maine* v. *Thiboutot*, 448 U.S. 1, 8 (1980)) when it enacted OBRA in 1981, and the clear import of amended Sections 402(a)(7) and (8) should be given effect by this Court.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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MAY 1984

APPENDIX A

UNITED STATES COURT OF APPEALS NINTH CIRCUIT

Nos. 82-4552, 82-4566, 82-4567 and 82-4599

SANDRA TURNER, DEBRA SCRUGGS, JERRYLEAN BAKER, on behalf of themselves and all others similarly situated, PLAINTIFFS-APPELLEES

v.

JEROLD PROD, individually and in his official capacity as the EXECUTIVE DIRECTOR OF THE DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA; ET AL., DEFENDANTS-APPELLANTS

DEPARTMENT OF SOCIAL SERVICES OF THE STATE OF CALIFORNIA, DEFENDANT and THIRD-PARTY PLAINTIFF/APPELLANT

v.

MARGARET HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, THIRD-PARTY DEFENDANT/APPELLANT

Argued and Submitted April 11, 1983

Decided June 10, 1983

As Amended Aug. 11, 1983

Appeal from the United States District Court for the Northern District of California

Before ELY, SKOPIL and FERGUSON, Circuit Judges.

FERGUSON, Circuit Judge:

In a case of first impression,[1] the State of California and the federal Department of Health and Human Services (HHS) appeal a grant of partial summary judgment against them and in favor of a state-wide class of workers receiving Aid to Families with Dependent Children (AFDC). The plaintiff class contends that the income used to calculate a welfare family's needs has never, and does not now, include the funds mandatorily deducted from a worker's paycheck for such items as income taxes because that money is never available to such families for the support of their children. The defendant governments reply that, while prior to 1981 the position of the plaintiff's may have been correct, the congressional AFDC amendments enacted in that year man-

[1] There are no circuit court opinions currently reported on this issue. There are nine district court decisions, eight of which have been reported. Five of them rule for the plaintiffs and three for the defendants. *RAM v. Blum*, 564 F.Supp. 634 (S.D.N.Y. 1983) (summary judgment and permanent injunction for plaintiff) (cited hereinafter as *RAM II*); *Williamson v. Gibbs*, 562 F.Supp. 687 (W.D.Wash. 1983) (preliminary injunction for plaintiff), *appeal docketed*, No. 83-3725 (9th Cir. Apr. 7, 1983); *Bell v. Hettleman*, 558 F.Supp. 386 (D.Md. 1983) (summary judgment for defendant), *appeal docketed sub nom. Bell v. Massinga*, No. 83-1227 (4th Cir. Mar. 15, 1983); *Nishimoto v. Sunn*, 561 F.Supp. 692 (D. Hawaii 1983) (summary judgment for plaintiff), *appeal docketed*, No. 83-1830 (9th Cir. Apr. 4, 1983); *Turner v. Woods*, 559 F.Supp. 603 (N.D.Cal. 1982) (permanent injunction for plaintiff) (affirmed in this opinion); *James v. O'Bannon*, 557 F.Supp. 631 (E.D.Pa. 1982) (summary judgment for defendant), *appeal docketed*, No. 82-1438 (3d Cir. July 21, 1982); *Dickenson v. Petit*, 536 F.Supp. 1100 (D.Me. 1982) (summary judgment for defendant), *aff'd on other grounds* 692 F.2d 177 (1st Cir. 1982); *RAM v. Blum*, 533 F.Supp. 933 (S.D.N.Y. 1982) (preliminary injunction for plaintiff (cited hereinafter as *RAM I*).

dated this change in departmental procedures. After careful consideration of legislative history, administrative interpretation and congressional purpose, the district court ruled for the plaintiffs in a decision which has the effect of raising AFDC benefits paid in California an average of $83 a month for each of 45,000 recipient families. Looking primarily to congressional purpose, we affirm, 559 F.Supp. 603.

FACTS:

Plaintiffs are the class of all past, present and future Aid to Families with Dependent Children recipients in California who have been or will be affected by a substantive change recently implemented in the AFDC program, purportedly as a result of the enactment of the Omnibus Budget Reconciliation Act of 1981. Pub.L. No. 97-35, § 2302, 95 Stat. 357, 844-45 (1981), 42 U.S.C. § 602(a) (OBRA). The defendants are those California agencies and officials responsible for administering the California AFDC program. The state, in turn, has brought in the Secretary of Health and Human Services as a third-party defendant.

AFDC is a federal-state public assistance program authorized by the Social Security Act. 42 U.S.C. §§ 601-76. States which participate provide assistance to those needy families that include a dependent child as that term is defined within the Act. 42 U.S.C. §§ 606-07. A percentage of the funds expended by a state is reimbursed by the federal government. *Id.* at § 603. In return for the federal funds, the states are required to administer their programs pursuant to a state plan which is in accordance with federal statutory provisions and HHS regulations governing AFDC. *Id.* at § 602.

An AFDC family's monthly grant is intended to be limited to the amount which the family needs. The statutes and the regulations attempt to accomplish this purpose by requiring that the state first set a dollar figure, known as the "standard of need," which reflects its view of the amount necessary to provide for essentials such as food, shelter, and clothing for hypothetical families of varying sizes.[1] *RAM v. Blum*, 533 F.Supp. 933, 937 (S.D.N.Y. 1982) (hereinafter *RAM I*). Next, the state determines the "level of benefits" it will pay, which need not be the full "standard of need" amount.[2] *Rosado v. Wyman*, 397 U.S. 397, 408-09, 90 S.Ct. 1207, 25 L.Ed.2d 442 (1970). The state then assesses an applicant-family's income and resources and compares the sum of money found to be available to it with the appropriate predetermined benefit level. If the family falls below that level, its AFDC grant will be the amount necessary to close the gap.

Congress originally brought AFDC into being as part of the first Social Security Act in 1935. Title IV, Part A, 49 Stat. 62; 42 U.S.C. §§ 601-76. The statute describes itself as having three purposes: (1) to provide adequate income for needy families with dependent children, (2) to keep such families together, and (3) to encourage adult members of such families to get and keep jobs. 42 U.S.C. § 601; *Shea v. Vialpando*, 416 U.S. 251, 253 & 264, 94 S.Ct. 1746, 1750, 40 L.Ed.2d 120 (1974). In 1981, when Congress extensively amended AFDC

[1] *See, e.g., Cal.Welf. & Inst.Code* § 11452 (West 1982).

[2] *See, e.g.*, Cal.Welf. & Inst.Code § 11450, which sets maximum grant amounts which are identical with those amounts currently set in the standard-of-need statute through family units of ten members.

as part of OBRA, 95 Stat. 843-60, this language was left unchanged. The purpose of OBRA was to bring the rapid growth of federal spending under control. "Views of the Committee on the Budget," Senate Report No. 97-139 (June 17, 1981), *reprinted in* 1981 U.S. Code Cong. & Ad. News 397.

Plaintiffs challenge new regulations promulgated by the state Department of Social Services at the direction of HHS following the passage of OBRA. EAS §§ 44-113.21; 44-113.212-13.[4] The regulations change the method by which AFDC benefits are calculated; the state now considers mandatory payroll deductions such as income tax withholding to be "work expenses" incurred by AFDC recipients in obtaining income and subjects them to a maximum

[4] SDSS—EAS §§ 44-113.211, 44-113.212 and 44-113.213, as amended November 10, 1981, read in relevant part:

> § 44-113.21 Computation of Net Nonexempt Earned Income for Aid to Families with Dependent Children
>
> .211 Determine the total amount of commissions, wages or salary earned as an employee during or applicable to the month (i.e., total income irrespective of expenses, voluntary or involuntary deductions). . . .
>
> .212 Determine the total profit from self-employment by a recipient whose earnings are not exempted under Section 4-111.22 by offsetting the business expenses against the gross income from self-employment.
>
> a. Personal expenses such as income tax payments, lunches, entertainment and transportation to and from work are not classified as business expenses and shall not be deducted from gross income in determining total profit earned from self-employment. . . .
>
> .213 For each recipient, combine any total earnings determined in .211 above with any total profit determined in .212.

monthly $75 cut-off amount rather than allowing them to be deducted in their entirety prior to calculation of grant monies due as was the practice in the past. The practical effect of these regulations is to reduce aid payments to approximately 45,000 AFDC families within the state by the amount of the respective mandatory payroll deductions withheld from the wages of working recipients. In California the average amount of such a deduction is $83 a month.

The Social Security Act, as amended, now requires states to perform a three-step calculation in order to determine AFDC benefits. (1) Determine income amount. (2) Subtract $75 for work expenses from that amount.[5] (3) Subtract the adjusted income amount derived from steps 1 and 2 from the dollar figure set in the state's calculation of level of benefits to determine the exact grant payment which will be made to the recipient. *RAM I*, 533 F.Supp. at 942; *Dickenson v. Petit*, 536 F.Supp. 1100, 1105-06 (D. Me. 1982).

Within this calculation framework, the parties disagree about the meaning of two key terms: "income" and "work expenses." After the 1981 OBRA

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[5] For four months at the beginning of an AFDC period of eligibility, a working recipient will also receive a "work incentive" disregard of $30 a month plus one-third of the remaining *net* income. After the fourth month the recipient will not be eligible again until that individual has been off AFDC entirely for a period of twelve consecutive months. 42 U.S.C. § 602(a)(8)(A)(iv), (B)(ii)(I). No aspect of this disregard is at issue in this case.

This four-month program is not to be confused with the old work incentive disregard enacted in 1967 and repealed by OBRA in 1981, the significance of which is discussed and illustrated *infra* at 1122-1123.

amendments which, *inter alia*, instituted the standardized $75 work expenses disregard, 42 U.S.C. § 602(a)(8)(A)(ii), HHS instructed the state agencies that "income" was to be construed as "gross income" and that mandatory payroll deductions for such items as income tax, FICA and disability payments were properly characterized as "work expenses" to be grouped with such expenses as transportation and uniform costs. This entire group of expenses would then be subject only to the standard $75 disregard, regardless of the actual amounts expended or withheld. The State of California has embodied those HHS instructions in the regulations which are at issue in this case. Plaintiffs contend that "income" means *net* income and thus mandatory payroll deductions are non-income items. Plaintiffs argue that the Social Security Act requires the agencies to deduct both the mandatory tax deductions (at Step 1, determination of income) and the $75 disregard amount (at Step 2, subtract work expenses) in determining the sum necessary to bring the recipient family up to the state's level of benefits.

In 1982, a mother with three children who earned the minimum wage ($3.35 an hour) 40 hours a week, 4.3 weeks a month, would have had $59.52 withheld in California for federal and state income taxes, FICA and state disability insurance. If that amount is offset at Step 1 as plaintiffs urge, her income is determined as follows:

$3.35 x 172 hrs./month	=$576.20
	− 59.52
Income Actually Available	$516.68

At Step 2, she would still have $75 available to cover her work-related expenses for transportation, uniforms, union dues, etc., which would in turn reduce

her income actually available for offset against her AFDC grant monies to $442, in whole dollars. Assuming a state benefit level of $601, $442 would be subtracted from that amount, giving her a monthly AFDC grant of $159.

However, if the calculation is made as the governments here urge, her income at Step 1 is $576, and at Step 2 eighty percent of her work-related expenses allowance of $75 is eliminated by withholding. The working recipient will be left with an offset amount of $501 and only $15 to cover the expenses arising from her job. When the $501 is subtracted from the $601 benefit level, she receives $100 in grant monies.

The district court granted partial summary judgment for the plaintiffs, and entered a permanent injunction in their favor, ruling that mandatory payroll deductions were non-income items eliminated at Step 1 of the calculation process and therefore could not logically also be work-related expenses. *Turner v. Woods*, 559 F.Supp. 603, 610 (N.D. Cal. 1982). The court grounded its decision in the longstanding administrative policy of offsetting against grants only money actually available to AFDC families, and in the purposes of the AFDC Act. It ordered the state agency to cease including these deductions within "income," and enjoined HHS from cutting off matching funds to California as a consequence of the state's compliance with the court's order. From this decision, the federal and state defendants appeal.

THE STATUTE:

The statute here at issue has been in the Social Security Act for over forty years. As originally passed in 1939, § 402(a)(7) read as follows:

> A state plan for aid and services to needy families must . . .
>
> (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child claiming aid to dependent children;

Social Security Amendments Act of 1939, Pub. L. No. 76-379, § 401(b), 53 Stat. 1360, 1379-80 (1939) (codified at 42 U.S.C. § 602(a)(7)(A)). In 1962, that section was amended as follows:

> (7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income; . . . .

In 1968, 42 U.S.C. § 602(a)(7) was further amended to link it with a revised 42 U.S.C. § 602(a)(8) which detailed disregards of earned income:

> (7) except as may be otherwise provided in clause (8), provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, . . . as well as any expenses reasonably attributable to the earning of any such income; (8) provide that, in making the determination under clause (7), the State agency—
>
> (A) shall with respect to any month disregard—

> (i) . . .; (ii) in the case of earned income of a dependent child . . . [or] a relative receiving such aid . . . the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month . . . .

In 1981, OBRA amended §§ 602(a)(7) and 602(a)(8) to provide as follows:

> (7) except as may be otherwise provided in paragraph (8) . . . provide that the State agency—
>
> > (A) shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children . . . .
>
> • • • • •
>
> (8)(A) provide that, with respect to any month, in making the determination under paragraph (7), the state agency—
>
> > (i) . . .; (ii) shall disregard from the earned income of any child or relative applying for or receiving aid to families with dependent children . . . the first $75 of the total of such earned income for such month (or such lesser amount as the Secretary may prescribe in the case of an individual not engaged in full-time employment or not employed throughout the month); (iii) shall disregard from the earned income of any child, [or] relative . . . an amount equal to expenditures for care in such month for a dependent child . . . receiving aid to families with dependent children and requiring

> such care for such month, to the extent that such amount (for each such dependent child . . .) does not exceed $160 . . . .

The plaintiffs here contend that § 602(a)(7) "income" is net income and that therefore mandatory payroll deductions never reach the agency for consideration in determining an AFDC family's need. The defendants contend that § 602(a)(8)(A)(ii) takes precedence over § 602(a)(7), that its "earned income" is gross income, and that the mandatory payroll deductions remain in the amount against which the agency offsets the first $75 of income per month. Our analysis must therefore consider, first, whether there is a difference between "income" under § 602(a)(7) and "earned income" under § 602(a)(8); and second, if there is, which subsection controls the characterization of mandatory payroll withholding under the current statutory scheme.

ANALYSIS:

A. *Standard of Review*

The district court granted summary judgment on a pure question of law, the interpretation of a statute. There are no disputed facts. Therefore, the standard of review is *de novo;* the appellate panel applies the same test for summary judgment as did the district court. *Radobenko v. Automated Equipment Corp.*, 520 F.2d 540, 543 (9th Cir. 1975).

In construing a statute in a case of first impression, the courts look to the traditional signposts for statutory interpretation: first, the language of the statute itself; and second, its legislative history and the interpretation given it by its administering agency, both as guides to the intent of Congress in enacting the legislation.

B. *Section 602(a)(7) Income*

1. The Language.

Although it is axiomatic that the place to begin in interpreting a statute is with the language itself, *Consumer Product Safety Commission v. GTE Sylvania*, 447 U.S. 102, 108, 100 S.Ct. 2051, 2056, 64 L.Ed.2d 766 (1980), the language is not helpful here. The term "income" as used in § 602(a)(7) is not defined within the statute. As for contemporary, common meaning, *Perrin v. United States*, 444 U.S. 37, 42, 100 S.Ct. 311, 314, 62 L.Ed.2d 199 (1979), the dictionary definition of income is ambiguous.[6]

2. Legislative History and Administrative Interpretation.

Evidence of congressional intent in enacting legislation is often found in legislative history, *see Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458, 94 S.Ct. 690, 693, 38 L.Ed.2d 646 (1974), and understanding legislative history is often aided by the history of administrative interpretations of a statute, *see Saxbe v. Bustos*, 419 U.S. 65, 74, 95 S.Ct. 272, 278, 42 L.Ed.2d 231 (1974).

Section 602(a)(7) was added to the Social Security Act in 1939 when Congress realized that in initially enacting legislation to help families of needy children, it had neglected to provide that sources of income already available to the household should be taken into consideration and deducted from grants which would otherwise be made. Pub. L. No. 76-379,

[6] It reads, "the money or other gain received . . . by an individual . . . for labor or services." *Webster's New World Dictionary of the American Language*, 711 (2d college ed. 1972).

53 Stat. 1379 (1939). The language was drafted by the Social Security Board.[7] H.R.Doc. No. 110, 76th Cong., 1st Sess. (1939) (Presidential report to Congress transmitting Social Security Board's "Proposed Changes in the Social Security Act"). In the hearings and floor debate which accompanied the amendment, concern was expressed that the needy not be penalized through inclusion in their income of sums not actually available to them. *See, e.g.*, testimony of Arthur Altmeyer, head official of Social Security Board, *Hearings Relative to the Social Security Amendments Act of 1939*, 76th Cong. 1st Sess. at 2254; remarks of Rep. Poage, 84 Cong. Rec. 6851, June 8, 1939. Although mandatory payroll deductions did not exist in 1939 in the form in which we know them now, because payroll withholding of income tax did not begin until 1943 and Congress therefore cannot have had these express deductions in mind, as early as 1937 there was modest payroll withholding for the Federal Insurance Compensation Act (FICA), and it seems fair to say that there was genuine congressional concern that resources counted against a family be actually available for its use.

The agency interpretations and behavior in this time period buttress the idea that Congress meant to offset only net income in determining assistance payments. In December 1940, the Social Security Board adopted a policy statement providing that § 602(a)(7)(A) income must "actually exist" and be "available to the applicant," defining availability as being "actually on hand or ready for use when needed."

[7] There have been three predecessor agencies to HHS—the Social Security Board, the Federal Security Agency, and the Department of Health, Education and Welfare. *RAM II*, at n.11.

In 1942, this policy was incorporated into an official manual used by the department for some period of time to instruct the states on federal AFDC requirements. *Guide to Public Assistance Administration*, ¶ 202, at 1-2 (1942).[8]

[8] The 1940 policy was expressed as follows: The policies and procedures adopted by the State agency shall be consistent with the following criteria for the consideration of income and resources in the determination of need:

> (a) The income or resource shall actually exist. Attributing a definite amount of income to sources or to kinds of property that produce either no income or less than the amount attributed to them is fictitious and such an imputed amount cannot properly be considered as an actual resource.
>
> (b) The income or resource shall be available to the applicant. To be regarded as available, an income or resource must be actually on hand or ready for use when it is needed. Consideration does not mean attributing a resource to sources from which income, contributions, maintenance, or support are not in fact available and forthcoming. Nor does it mean including as available for conversion to cash, ownership in real and personal property that is already meeting established requirements of the needy person or family.
>
> (c) The income or resource shall have some appreciable significance in meeting the requirements of the applicant. The amendments are not intended to require State agencies to bring inconsequential resources under scrutiny in establishing need, such as those resulting from casual earnings, small and unpredictable gifts of indeterminate value, or past income that will not continue in the future.
>
> (d) The income or resource shall be considered from the standpoint of its conservation and its maximum utilization in the interest of the welfare of the applicant. The effect of the resource on need should be taken into full consideration both in regard to the requirements that it provides on one hand, and the expenses that are associated with the applicant's obtaining, conserving, or utilizing it on the other.

It was reiterated nearly verbatim in the 1942 Manual. Bureau of Public Assistance, State of Administration, Part II, Plan of Operation, Recommended Criteria of Need (May 22, 1942) at 2.

From the middle 1950s to the present, there has been an agency regulation defining the term "income" as it appears in § 602(a)(7)(A) as "net income" *RAM I*, 533 F. Supp. at 942; *see, e.g., Lewis v. Martin*, 397 U.S. 552, 555, 90 S.Ct. 1282, 1283, 25 L.Ed.2d 561 (1970).[9] It was republished *after* OBRA was enacted and now reads:

> A State Plan for . . . AFDC . . . must . . . provide that, in determining need and the amount of the assistance payment, . . . *net* income . . . and resources available shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.

45 C.F.R. § 233.20(a)(3)(ii)(D), *as amended by* 47 Fed. Reg. 5648, 5675 (Feb. 5, 1982) (emphasis added).

It is clear that the agency charged with the administration of this statute has long regarded it as dealing with net income exclusively. That interpretation

[9] The 1967 version of the regulation quoted in *Lewis v. Martin*, 397 U.S. at 555, 90 S.Ct. at 1283, reads: "[O]nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis will be taken into consideration in determining need and the amount of payment." The Supreme Court said the regulation clearly comported with the Act.

has not changed in the wake of OBRA. Such an agency interpretation, while not binding, is entitled to substantial deference by a court. *United States v. Rutherford*, 442 U.S. 544, 553-54, 99 S.Ct. 2470, 2475-2476, 61 L.Ed.2d 68 (1979); *New York State Department of Social Services v. Dublino*, 413 U.S. 405, 421, 93 S.Ct. 2507, 2516, 37 L.Ed.2d 688 (1973). That deference is heightened when the interpretation has remained consistent for long periods of time. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17, 101 S.Ct. 817, 823 n.17, 66 L.Ed.2d 762 (1981). Here we deal with an uninterrupted, consistent interpretation stretching over forty years. Moreover, the practice of treating income for purposes of determining need as net income has received tacit legislative approval since Congress has never availed itself of the opportunity to amend this language even though it has altered this section at least three times—in 1962, 1967 and 1981. *See Saxbe v. Bustos*, 419 U.S. at 74, 95 S.Ct. at 278 (congressional silence implies approval of "longstanding administrative construction").

This legislative and administrative history of the term income was regarded as largely dispositive by the district court, *Turner v. Woods*, 559 F. Supp. at 610-11, and was similarly weighted by the courts in *Williamson v. Gibbs*, —— F. Supp. ——, ————, No.C83-164R (W.D. Wash. Mar. 28, 1983); *Nishimoto v. Sunn*, —— F. Supp. ——, ————, No. 82-03591 (D. Hawaii Jan. 6, 1983); and *RAM I*, 533 F. Supp. at 942, 945. They reasoned that if "net income" was what was established at Step 1 of the AFDC procedure, the mandatory payroll deductions were already absent from the monies available prior to the application of the deductions specified at Step 2, by

§ 602(a)(8). We continue our analysis, however, because the defendants contend that the key statutory term is not "income" as it appears in § 602(a)(7) but rather "earned income" as it appears in § 602(a)(8)(A)(ii).

C. *Section 602(a)(8) "Earned Income"*

1. The Language.

Defendants argue and the court in *Dickenson v. Petit*, 536 F. Supp. at 1111, reasoned that because § 602(a)(7)(A) speaks in terms of "income" without qualification, while § 602(a)(8) speaks in terms of "earned income," § 602(a)(7)(A) must have a broader meaning: that it must include both earned and unearned income. The court continued,

> "Earned income," which includes tax withholdings, is thus a subset of the more general category of "income." *A fortiori*, "income" in section [6]02(a)(7) includes tax withholdings.

Id. The *Bell* court extended this line of reasoning further, saying:

> The word "income" is used in 42 U.S.C. § 602(a)(7). The words "earned income" are used in 42 U.S.C. § 602(a)(8). § 602(a)(7) has *since 1968* contained the direction that where § 602(a)(8) applies, *i.e.*, to earned income, calculations are to be made not under (a)(7) but under (a)(8).

Bell v. Hettleman, 558 F. Supp. 386, 393 (D. Md. 1983) (emphasis added). The "direction" to which the *Bell* court referred occurs at the beginning of § 602(a)(7) and reads: "except as may be otherwise

provided in paragraph (8) . . . . , provide that the State agency . . . ."

Both the *Bell* and *Dickenson* courts ignore the historical fact that while the language which they *quote* has remained essentially unchanged since 1967, prior to the enactment of OBRA in 1981, § 602(a)(8) dealt *only* with the old work incentive disregards which required additional deductions from household income and did not deal in any way with disregards of work expenses or offsets for mandatory tax withholding. In other words, before 1981 § 602(a)(8) did not act in any way whatever as a substitution for or limitation on § 602(a)(7). *See* full text of statutes at 1113-1114 *supra*.

Indeed, before OBRA was passed it was the intent of § 602(a)(8) to maximize the amount of earned income which AFDC recipients could keep, thereby making it as worthwhile as possible for them to obtain and keep employment. *See, e.g.* Notice of Final Policies and Requirements, 34 Fed. Reg. 1394 (1969); S.Rep. No. 744, 90th Cong., 1st Sess. (1967), in 1967-2 U.S. Code Cong. & Admin. News, pp. 2834, 2837; *RAM v. Blum*, —— F. Supp. —— at n.32 No. 82 Civ. 372 (RJW) (S.D.N.Y. May 17, 1983) at n.32 (hereinafter *RAM II*). This goal was in part accomplished by statutorily using the term "earned income" and then regulatorily defining that term in as all-inclusive a fashion as possible, so that when the monthly $30 plus one-third disregard was calculated, as small an amount as possible was available for subtraction from the state level of benefits. *See* example *infra* at 1122-1123.

Prior to the enactment of OBRA, § 602(a)(7) had a complementary purpose. The statutory language required deduction of any reasonable expenses attrib-

utable to employment, *Shea*, 416 U.S. at 260, 94 S.Ct. at 1753, and the regulations spoke in terms of deducting from monthly grant monies only those funds actually available for the support of the child. This construction also maximized the amount of their earnings which AFDC recipients could keep.

In order that the two subsections work together to make the disregards as large as possible, it was necessary that the calculations of subsection 8 be performed prior to the subtractions of subsection 7; in that fashion, the recipient was entitled to offset one-third of the largest possible sum. Therefore, the introductory language which *Bell* quotes came into the law in 1967. The purpose of that language in 1967 was certainly not to control all calculations applying to earned income, as the *Bell* court said, since any reasonable expenses attributable to the earning of income were controlled by § 602(a)(7) from 1967 until 1981. We therefore reject *Bell*'s construction of this wording of the statute.[10]

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[10] A similar historical misunderstanding led the *Dickenson* court to mistakenly cite a 1971 opinion of this circuit in support of its construction of the term "income." 536 F.Supp. at 1111 n.7. In *Arizona Dep't of Public Welfare v. Dep't of Health, Education & Welfare*, 449 F.2d 456 (9th Cir. 1971), we required that disregards from earned income under § 602(a)(8)(A) be made from the gross amount and assumed a definition of that term which included mandatory payroll withholding. At that time, that subsection of the statute and 45 C.F.R. § 233.20(a)(6)(iv) applied only to the work incentive disregard provision subsequently repealed by OBRA. Because of this, the case has no bearing on the exclusion of mandatory payroll deductions and out-of-pocket work expenses; they were then governed exclusively by § 602(a)(7) and its implementing regulations. We observed then:

> [W]e think it entirely reasonable for the Secretary to interpret "earned income" in the Act's disregard pro-

2. Legislative History and Administrative Interpretation.

As noted above, when Congress enacted AFDC in 1935, it did not provide for reduction of its grants in aid to needy families when there were other sources of income available to the child. Congress eliminated this problem in 1939 by requiring that grants be referenced to recipients' other income sources. An AFDC recipient's grant was henceforth reduced by the exact amount of that individual's non-AFDC income. This served one AFDC purpose, that of providing for only those children in actual need, but it disserved another purpose, that of encouraging adult recipients to accept or retain paid work outside the home, because there was no allowance for costs of employment such as transportation and uniform expenses. The Act in its 1939 form actually discouraged AFDC recipients from working because it left them with less money when they worked than it did when they did not. S.Rep. No. 1589, 87th Cong., 2d Sess., 17-18 (1962); H.R.Rep. No. 1414, 87th Cong., 2d Sess., 23 (1962); 1962 U.S. Code Cong. & Ad. News 1943, 1959-60.

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visions, 42 U.S.C. § 602(a)(8)(A), as referring to gross earned income. *Nothing in the legislative history negates this broader reading of "earned income,"* and common usage supports it.

Id. at 470 n.21 (emphasis added). *Arizona v. HEW* thus construes a statutory provision which has passed out of existence and grounds in deference to the Secretary. We explain *infra* why we believe that deference is inappropriate on this issue in the instant case. Moreover, the legislative history briefly outlined above, while fully supportive of the *Arizona v. HEW* result, does not support the post-OBRA interpretation which the agency now advances in *Turner*. For all three of these reasons, we think that *Arizona v. HEW* is in no way helpful in attempting to understand the problem presented by *Turner*.

The federal agencies administering the program recognized this disincentive and urged, but did not require, states to allow credit for work-related expenses in determining eligibility. Social Security Board State Letter No. 4, "Facilitating Employment of Assistance Recipients Through Means of Sound Determination of Need" (April 30, 1942), republished in *Handbook of Public Assistance Administration* at § 3140 (1962); *Shea*, 415 U.S. at 259, 94 S.Ct. at 1753; *RAM II*, at —— & n.22. However, in the 1939-1962 period neither the states nor the agency regarded mandatory payroll deductions as work expenses. *RAM II*, at ———— & nn. 22 & 23. For example, in 1959 HEW reported that the states used the term "gross income" to refer to "take-home pay" after payroll deductions and the term "net income" to refer to amounts available after "other employment costs have been recognized." HEW Report, "State Methods for Determining Need in the Aid to Dependent Children Program," Public Assistance Report No. 43 (May 1961) at 25, cited in *Bell v. Hettleman*, 558 F. Supp. at 391-92.

In 1962, Congress eliminated the disincentive to work by amending the statute to make the agency's optional practice mandatory for the states. The Act now provided that AFDC recipients must be given full credit for "work expenses." It instructed the state agencies to disregard "[a]ny expenses reasonably attributable to the earning of . . . income" in the calculations made for purposes of determining AFDC benefits. 42 U.S.C. § 602(a)(8)(A)(ii)-(iii); *Shea*, 415 U.S. at 263-65, 94 S.Ct. at 1755.

In 1967, Congress moved to provide further encouragement for adult members of AFDC families to work. It enacted the so-called "work incentive dis-

regard" by which the first $30 of gross income earned, plus the next one-third of gross income earned in each month, was disregarded in the calculation of AFDC benefits. Pub. L. No. 90-248, 81 Stat. 821, 881 (1968). This created a substantial inducement for such adults to work as it allowed their pay to add greatly to their disposable income. (This is demonstrated in the illustrative calculations provided at 1122-1123 *infra*.)

Between 1962 and 1974, some twenty states moved to simplify the administration of the work expenses allowance by providing a flat sum of money to cover estimated average expenses rather than listing them individually for each claimant. However, in 1974, the Supreme Court required that the "work expenses" disregard be itemized for each AFDC family, holding that failure to do so (1) contradicted the plain language of the statute which allowed "any" expenses which were reasonable and (2) contravened a basic purpose of the act in that it discouraged employment in AFDC families. *Shea v. Vialpando*, 416 U.S. at 260, 94 S.Ct. at 1753. The Court stressed the second reason in holding that a flat sum was permissible for administrative reasons as long as provision was made to compensate those claimants whose work-related expenses exceeded the flat sum amount so that no claimant would suffer any loss of income by working. *Id.* at 265, 94 S.Ct. at 1755.[11]

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[11] The defendants rely heavily on *Shea* in their argument that mandatory payroll deductions are work-related expenses and that such expenses must be taken from gross income. *See Bell v. Hettleman*, 558 F.Supp. at 391; *Dickenson v. Petit*, 536 F.Supp. at 1112 & 1114. We do not find *Shea* at all helpful to defendants, however. *Dickenson* does not really rely on *Shea*, but rather says only that *Shea* "implies" such an idea and asserts that its own decision is within "the penumbra" of

In the post-*Shea* period, itemization fully reimbursed working AFDC recipients but created a substantial administrative burden. Several long agency documents and reports where mandatory payroll deductions are grouped with and referred to as "work related expenses" date from this post-1974 period. The defendants point to these documents as proof that such deductions are work-related expenses and either (1) always have been so, or (2) became so after 1974 and certainly were so regarded by Congress by the time OBRA was enacted in 1981. S.Rep. No. 97-139, 97th Cong., 1st Sess. 501-02 (1981); 1981 U.S. Code Cong. & Ad. News 396, 768-79.

By 1981, Congress had apparently had enough of the administrative difficulties and expenses and the problems of applicant falsification created by individual itemization of work expenses. "Senate Finance Committee Recommendations, Social Security Provisions," *reprinted in* 1981 U.S. Code Cong. & Ad. News 396, 768. It enacted OBRA, which overruled *Shea* by

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Shea. *Id.* Even this cautious line is, we think, overstated; the only reference within *Shea* which even arguably characterizes such deductions as work expenses is grammatically ambiguous. *Shea*, 416 U.S. at 254-55 & n.3, 94 S.Ct. at 1750-1755 & n.3; *Turner*, 559 F.Supp. at 612-13 n.6.

The holding of *Shea*, that work expenses cannot be compensated for AFDC recipients in flat sum amounts because the Act required full compensation for any reasonably work-related expenses, has been legislatively overruled, leaving the case as doubtful authority at best. To the extent that *Shea* survives overruling by OBRA, it seems to us to stand for the twin propositions that in construing AFDC legislation one looks to its wording and the intent of Congress in its enactment. Thus, *Shea* seems to us to support the position of the plaintiffs in this litigation, as we explain in section D of this opinion *infra*.

standardizing the "work expenses" disregard; instead of individual itemization, each working AFDC recipient now receives a standardized credit of $75 per month against income, regardless of the amount of the individual's actual work expenses. There is nothing in the legislative history of this amendment which definitively speaks to the issue of whether Congress intended to include mandatory payroll withholding in this change. Nonetheless, at least two witnesses did categorize mandatory payroll deductions as work-related expenses in their testimony at legislative committee hearings.[10] However, testimony of witnesses before congressional committees prior to passage of legislation generally constitutes only "weak evidence" of legislative intent. 2A C.D. Sands, *Statutes and Statutory Construction, A Revision of the Third Edition of Sutherland on Statutory Construction* § 48.10 (4th ed. 1973).

Since 1969 there has been an agency regulation defining § 602(a)(8) "earned income" as gross income. Its current, post-OBRA form reads:

> the total amount, irrespective of personal expenses, *such as income-tax deductions*, lunches,

[10] *See* testimony of Christine Pratt-Marston for the National Anti-Hunger Coalition, *Administration's Proposed Savings in Unemployment Compensation, Public Assistance, and Social Services Programs: Hearings Before the Subcommittee on Public Assistance and Unemployment Compensation of the Committee on Ways and Means, House of Representatives*, 97th Cong., 1st Sess. 88-89 (1981); Testimony of Marian Wright Edelman, President, Children's Defense Fund, *Spending Reduction Proposals, Hearings Before the Committee on Finance, United States Senate*, Part 1, 97th Cong., 1st Sess. 277 (1981). Portions of their testimony are reprinted in *Bell v. Hettleman*, 558 F.Supp. at n.16.

> and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, or transportation to call on customers.

45 C.F.R. § 233.20(a)(6)(iv), *as amended in* 47 Fed. Reg. 5648, 5676 (1982) (emphasis supplied).

Arguing judicial deference to an agency interpretation, *Quern v. Mandley*, 436 U.S. 725, 738, 98 S.Ct. 2068, 2076, 56 L.Ed.2d 658 (1978), the defendant governments contend that this alone should be dispositive. However, as we have indicated:

> [A]n agency's interpretations are not conclusive, and the courts are not bound by them. *Social Security Board v. Nierotko*, 327 U.S. 358, 369 [66 S.Ct. 637, 643, 90 L.Ed. 718] (1946). In particular, the deference due an administrative interpretation depends upon its consistency with earlier agency pronouncements, *Morton v. Ruiz*, 415 U.S. 199, 237 [94 S.Ct. 1055, 1075, 39 L.Ed.2d 270] (1974), the purpose and wording of other agency regulations, *Pacific Coast Medical Enterprises v. Harris*, 633 F.2d 123, 131 (9th Cir. 1980), and the purposes of the relevant statutes. *United States v. Larionoff*, 431 U.S. 864, 873 [97 S.Ct. 2150, 2156, 53 L.Ed.2d 48] (1977).

McCoog v. Hegstrom, 690 F.2d 1280, 1284 (9th Cir. 1982). As mentioned, the term gross income has been differently defined at different times in the history of agency administration of AFDC. *Bell v. Hettleman*, 558 F.Supp. at 391-92. Thus, the simple definition of the term is inconsistent with earlier pronouncements. More important, the regulation, as the agency proposes to administer it, is in flat contradiction with

the regulatory interpretation of 42 U.S.C. § 602(a)(7) embodied in 45 C.F.R. § 233.20(a)(3)(ii)(D), which has been agency policy for forty years, as discussed *supra* in Section B. Finally, the proposed application of this regulation undermines the purposes of both OBRA and the AFDC Act, as we discuss in Section D *infra*. For these reasons, deference is not appropriate in this context.

In our view, *if* mandatory payroll deductions enter into income at all, they must be treated as work-related expenses subject to the $75 ceiling enacted by OBRA, because no separate disregard for payroll withholding exists. It is this argument which the *Dickenson*, *O'Bannon*, and *Bell* courts found persuasive. *Bell v. Hettleman*, 558 F.Supp. at 391-92; *James v. O'Bannon*, 557 F.Supp. at 639; *Dickenson v. Petit*, 536 F.Supp. at 1110-15. We, however, reject the original premise of the argument that such withholding enters into income.

The 1981 Congress certainly had the power to change the intent of the legislation enacted by the 1939 and 1962 Congresses, that payroll withholding not be counted as available to the claimant. But did the 97th Congress do so? This long history seems inconclusive. Allowances for mandatory payroll deductions were widely made before 1962, *RAM II*, at ———— & n. 22, either on the strength of the agency's interpretation of the § 602(a)(7) "income available to the applicant" standard or, perhaps, on the basis of the statutory purpose alone. 42 U.S.C. § 601. In the legislative history of the 1962 amendment, which first brought "work related expenses" into AFDC law, there is no reference to mandatorily withheld taxes as work-related expenses. *RAM I*, 533 F.Supp. at 946. The *RAM I* court observed that such

reference was unnecessary with regard to this amendment since the deductions were already being made under the "net income" provisions of § 602(a)(7)(A). *Id.* Moreover, after the amendment passed, HEW prepared the *Handbook of Public Assistance Administration* for distribution to the states to aid them in calculating allowable work-related expenses; mandatory payroll deductions do not appear on the lists provided although they were routinely deducted from income at that time. *RAM II*, at ————; *Bell v. Hettleman*, 558 F.Supp. at 391.

Between 1962, when the work expenses disregard was mandated, and 1974, when *Shea* was decided, the two groups of items were treated differently in the states which allocated flat sums to cover expenses; in these states mandatory payroll deductions continued to be individually itemized in this period. *See, e.g.*, the Colorado plan described in *Shea*, 416 U.S. at 255, 94 S.Ct. at 1751; *RAM II*, at ———— & n. 26. The district court in the instant case believed that this practice evidenced their conceptually different origin in the law as "non-income items." It reasoned that only in the post-*Shea* period did it become "administratively convenient" to group the two together since both were deducted from gross income and their order and grouping made no difference in the calculation of AFDC benefits as performed at that time. *Turner v. Woods*, 559 F.Supp. at 612.

In summary, surviving agency records seem to indicate that, prior to 1962, such deductions were seen as funds not available to the recipient and thus were categorized as non-income items. The total absence of reference to mandatorily withheld taxes in the legislative history of the 1962 agency-initiated congressional amendment and in the subsequent agency pub-

lications, and the 1962-74 bookkeeping practices of the only states which would have had any reason to differentiate between the two types of items, indicate that prior to the *Shea* decision, the two items continued to be seen as conceptually different. It is only in the post-*Shea* era, when that difference becomes irrelevant because both sums are being deducted in full from total earned income, that the agency and the states apparently began to refer to mandatorily withheld payroll deductions as work-related expenses. It goes without saying that a change in the way in which an agency administers a statute does not change the intent with which Congress enacted it. The defendants appear to argue here that the agency practice became so notorious between 1972 and 1981, and the documents presented to Congress in 1981 were so clear in their references to such taxes as work-related expenses, that the 97th Congress intentionally chose to repeal *sub silentio* the "income available" standard of the 76th Congress. The change in agency practice seems established. Whether Congress had adequate notice of that change is unclear. What is clear is that Congress had no notice of the fact that the change would create a conflict with longstanding and familiar interpretations of § 602(a)(7). We therefore refuse to hold that Congress has repealed a forty-year-old policy by implication. We are aided in reaching this conclusion by our consideration of the underlying purposes of the two statutes which follows.

D. *Congressional Purpose*

As noted earlier, the legislative and administrative histories are usually pursued in an effort to ascertain something more important, the purpose of Congress in enacting a specific piece of legislation. If a

court can ascertain that purpose, it is usually dispositive of an issue of statutory construction. *Chapman v. Houston Welfare Rights Organization*, 441 U.S. 600, 608, 99 S.Ct. 1905, 1911, 60 L.Ed.2d 508 (1979); *Philbrook v. Glodgett*, 421 U.S. 707, 713-14, 95 S.Ct. 1893, 1898, 44 L.Ed.2d 525 (1975). In this instance, we have two such acts, AFDC and OBRA.

In the case of AFDC, the statute itself states its purposes. It reads in relevant part:

> For the purpose of authorization of appropriations . . . enabling each State to furnish financial assistance . . . to needy dependent children and the parents or relatives with whom they are living . . . and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection. . . .

42 U.S.C. § 601. Those purposes have been construed and commented upon at length by the Supreme Court. *Shea v. Vialpando*, 416 U.S. at 253, 94 S.Ct. at 1750 (see discussion *supra* at 1119 & n. 10). *Shea* ultimately teaches two things: In construing AFDC legislation, look to (1) the language and (2) the underlying purposes of the Act. In *Shea*, the Court struck an agency-approved practice in part because it undermined one of the Act's principal purposes; it discouraged welfare recipients from working by failing to reimburse them fully for their working expenses. *Id.* at 265, 94 S.Ct. at 1755. The statutory language embodying the purposes of AFDC stands today in the Act as it was at the time of *Shea*. It was not amended by OBRA in 1981.

The Omnibus Budget Reconciliation Act was framed in order to restrain federal spending, specifically by reducing its growth, according to the House Budget Committee Report. 1981 U.S. Code Cong. & Ad. News at 398. Without citation of authority, the Third Circuit has recently observed:

> The primary purpose of the OBRA amendments to the AFDC program is to reduce or eliminate welfare benefits for those considered by Congress to be less needy than those completely without resources—persons or households that have available other sources of income or resources with which to support themselves.

Philadelphia Citizens in Action v. Schweiker, 669 F.2d 877, 879 (3d Cir. 1982). There are actually two Congresses and two sets of intentions at issue here; however, the 97th (OBRA) Congress, while making the changes in benefits which we have discussed at length, also left intact the earlier language of the 76th Congress embodying the statutory purposes. Therefore, it seems incumbent upon a court to reach a reading which accommodates both purposes as well as possible. We hold that the district court's reading, with minor clarification, does that.

Granting *arguendo* that OBRA's purposes were as stated by the Third Circuit, the congressional AFDC amendments which are not at issue in this case fully accomplish them. The major money-saving change in this aspect of AFDC arises out of the virtual elimination of the work incentive allowance. From 1967 to 1981, a working AFDC recipient was permitted to disregard $30 plus one-third of *gross* income *each* month. For someone employed full time at the minimum wage, this amounts to a sum of several hundred dollars monthly. Under OBRA, this disregard may be taken only on *net* income, and then for only the first four months *of eligibility*; a recipient may not again utilize this disregard until s/he has been off AFDC for a period of twelve consecutive months. Second, under pre-OBRA law, child care expenses were deductible in full. Now they are subject to a cap of $160 a month per child. Finally, other work-related expenses were deductible in full. Now they are subject to a maximum of $75 per month. None of these changes are disputed here, and as the example below indicates, they represent a substantial reduction of benefits.

A set of calculations based upon the income of one class member, Catherine Bass, will illustrate these different systems of calculation and demonstrate why the district court ruling best embodies the various goals of the different pieces of legislation here at issue.

Ms. Bass has five children. She is eligible for a grant of $771 per month if she does not work at all. She works full time and earns $730 per month. She has child care expenses of $235 per month, other actual work-related expenses of $180 per month, and has $84 a month withheld mandatorily from her paycheck.

Under the pre-OBRA AFDC provisions, the agency would first have deducted the work-incentive allowance, $30 plus one-third of her gross income, subtracting $273 from her income of $730. Then it would have subtracted $84 for mandatory withholding and $415 for her actual work expenses plus child care. That leaves Ms. Bass with a total net income of minus $42; therefore, none of her working income would have been offset against her grant monies, and she would have collected her full grant amount of $771 a

month. That would bring $1501 into her household each month; actual work-related expenses and withholding amount to $499, leaving her with $1002 as spendable income. Since she would have received $771 for doing nothing, her financial incentive for a full month of work is $231.

Under the post-OBRA method of calculation which the governments espouse, Ms. Bass is still eligible for $771 and still earns $750. She does not receive the work-incentive disregard nor are the mandatory deductions subtracted. She is allowed to subtract her child care expenses of $235 and take the $75 work-expenses disregard, which reduces her income to $420. When the state offsets this against the $771 grant amount, that qualifies her for $351 in AFDC funds, so that a total of $1081 comes into her household each month. However, she has actual work-related expenses of $415 and $84 in payroll withholding, which when subtracted from the $1081 amount, reveal that she is receiving $582 a month for working when she could get $771 from the state simply by staying home. It is costing her $189 monthly to go to work.

Under the construction of the Act adopted by the district court, Ms. Bass subtracts $84 in payroll deductions from her $730 salary, leaving her with $646. She then subtracts an additional $75 for work-related expenses and $235 in child care, leaving her with the sum of $336 to offset against the maximum grant of $771. The state will pay her $435 a month in grant monies, bringing a total of $1165 into her household. The $499 she actually spends ($415 plus $84) subtracted from that amount leaves her with income of $666, which is $105 less a month than she would receive for staying at home. While she is still penalized for working, the penalty is less; and since

the defendants contend that California working expenses are very high,[13] it is possible that nationally this method of calculation does not actually fine the recipient for working.[14] In any event, this method of calculation provides *less* of a disincentive to work than does that advanced by the government. If the court is to give any meaning at all to the purposive language which remains within the AFDC Act, it would seem that adoption of this method of calculation is required.

This construction also best implements the purposes of OBRA to "reduce welfare benefits" and restrain the growth of government spending since it is important to remember that the choice is *not* between making higher or lower benefit payments. The state levels of payments have been set. *See, e.g.*, Cal. Welf. & Inst. Code § 11452. The choice is between working

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[13] *See, e.g.*, California Department of Social Services, AFDC Social and Economic Characteristics for Families Who Received Aid during July 1980, Program Series Information Report 1982-01, Table 18 (January 1982), which reports that in July 1980, average monthly transportation for California's working AFDC recipients was $48. That figure, as well as being three years old, was low to begin with. *Green v. Obledo*, 29 Cal.3d 126, 139, 172 Cal.Rptr. 206, 624 P.2d 256 (1981).

[14] According to the Center for the Study of Social Policy, as extensively reported by the U.S. Civil Rights Commission in May 1983, under the present method of calculating AFDC benefits established under the 1982 post-OBRA regulations, AFDC recipients in twelve states, including California, lose money if they work. Those in another nine states earn less than $10 in extra income for a full month of work. In only four states was the amount of increased income greater than $100 and that occurred because the basic benefits were set at a low level in those states. United States Commission on Civil Rights, *A Growing Crisis: Disadvantaged Women and Their Children* (May 1983) at 28-29 & Table 3.8.

and not working. If the disincentive provided is strong enough, there is no reason to believe that AFDC recipients will work in order to pay handsomely for the privilege. If that eventuality materializes, the result of the statutory construction which the governments urge will be a rise in government spending through increased welfare payments —an end result which would contravene the intent of both the 76th and the 97th Congresses. *RAM II*, at ——. We therefore hold that mandatory payroll deductions for taxes, i.e., local, state and federal income taxes, Social Security, FICA, state disability programs and equivalent items and programs, are not income for purposes of AFDC calculations performed pursuant to 42 U.S.C. §§ 602(a)(7) and 602(a)(8).

The state appellants contend that the district court holding fosters disparity and invites fraud. They stress the possibility of fraud in the number of dependents declared for tax purposes by AFDC recipients and the inequity of allowing an offset for such items as union dues and uniforms when mandatorily withheld when there is no such allowance for a worker who must pay those same sums out of income actually received.[15] In California past AFDC prac-

[15] The state asserts as well that if the district court interpretation of the law is implemented, the OBRA amendments will cost the government money rather than saving it. It relies on an affidavit of HHS AFDC official Linda S. McMahon to buttress this assertion. The affidavit is unclearly worded and, perhaps because of this, seems internally contradictory. Compare paragraph #4 with paragraph #5. Moreover, the assertion which the state and Ms. McMahon make is patently untrue in that they make no allowance for OBRA's chief economizing feature, the repeal of the old work incentive disregard. *See* example *supra* at 1122-1123. *See Bell v. Hettleman*, 558 F.Supp. at 393-94 n.12 (similar affidavit not relied upon).

tice has required recipients to report the number of dependents whom they have claimed for tax purposes to the state agency, and that number had to be congruent with the number claimed for AFDC purposes. EAS § 44-133.241(1) (repealed by Manual Letter 81-65, November 10, 1981). That regulation could be reinstated with minimal difficulty should it be needed. Moreover, a recent California Court of Appeals decision makes income tax refunds income for AFDC purposes,[16] a categorization which could serve as a second check on fraud. When one considers as well that each AFDC recipient is required monthly to show his payroll check stub to the county welfare agency, EAS § 40-181.2, we see little possibility of fraud in this area.

With regard to the non-governmental deductions, we see nothing in the district court opinion which denominates them as non-income items. The district court speaks of mandatory payroll withholding in terms of "federal, state and local income taxes, Social Security taxes (F.I.C.A.), and state disability," *Turner*, 559 F.Supp. at 616, and the appellees speak of "mandatory *tax* withholding." We believe the *Turner* holding to be limited to these and equivalent areas. Most workers who receive payroll checks must pay governmentally withheld amounts for these purposes, and the amounts are easily verified. By limiting the district court's ruling in this fashion, if indeed we limit it at all, we conform to the intent of Congress in enacting OBRA, which was to make the handling of AFDC administratively simpler and less

[16] *Turner*, 559 F.Supp. at 615-16 n.11; *Vaessen v. Woods*, 131 Cal.App.3d 1025, 182 Cal.Rptr. 725 (1982), *hearing & alternative writ of mandate granted* (Aug. 9, 1982) (Nos. LA 31617 & LA 31602).

time consuming. Since payroll stubs of all working AFDC recipients may already be reviewed monthly, we agree with the district court in its characterization of mandatory payroll withholdings as "paradigmatic examples of items *not* subject to applicant falsification and not at all difficult for administering states to calculate." *Turner v. Woods*, 559 F.Supp. at 613 (emphasis in original).

In summary, legislative and administrative history demonstrate that "income" for purposes of § 602(a)(7) should be construed as income net of mandatory payroll deductions. To construe § 602(a)(8) as the defendants urge would require us to determine that Congress repealed a long-standing policy by implication; we decline to do so. Both the purposes of AFDC embodied in the statute, and the purposes of OBRA as stated in the legislative history and expanded upon in the case law, are best served by a holding that "income" for AFDC purposes does not include mandatory payroll withholding for items such as local, state, and federal income taxes, FICA, state disability and equivalent governmental programs. The district court is AFFIRMED.

APPENDIX B

Internal Agency Memorandum Dated
February 1, 1972

CONSIDERATION OF EXPENSES OF EMPLOYMENT—AFDC

1. In the three orientation sessions held for Regional Offices in the late summer of 1971, APA and GC took the position that, as a minimum, a State agency must recognize the following as expenses reasonably attributable to the earning of income:

Mandatory Payroll Deductions
Transportation
Personal Expenses, including lunches
Tools, Uniforms and other such needs
Child Care

2. It is not possible to determine from State Plan material presently available in Central Office exactly what state agencies are considering as expenses of employment. The "listings" are usually simply exact copies in whole or in part, of the Handbook dating back to the '50s. Policies in some state agencies have not been revised since that time.

3. There is no national uniformity of definition for many of the items listed as expenses. For example, mandatory payroll deductions may or may not include Social Security, group insurances, union dues or retirement.

4. Many States are presently questioning whether mandatory payroll deductions should be an expense of employment. While the House Ways and Means Committee in discussing the 30 and ⅓ disregard does not mention expenses of employment, Section

402(a)(7) (and Sections 102(a)(10); 1002(a)(8); 1402(a)(8); 1602(a)(14)) of the Social Security Act is clear on this subject.

Standards for Expenses of Employment vs. Maximums

1. A *standard* for expenses reasonably attributable to the earning of income:

a. Provides for equitable and uniform administration,

b. If justifiable, is consistent with "reasonably attributable" under the Act,

c. Eliminates the objectionable feature of maximums in that those persons whose expenses are small will get the standard; those persons whose expenses are larger than the standard will receive the standard amount and will need to make adjustments other than monetary.

2. A *maximum* for expenses reasonably attributable to the earning of income:

a. Seems to be inconsistent with the Social Security Act,

b. Is not consonant with simple and uniform administration,

c. Is discretionary and subjective thus causing lack of uniformity of application,

d. Contributes to over and under payments,

e. Creates problems for persons with large expenses of employment because they would be cut off at the maximum; persons whose expenses are small or within the maximum would not be hurt,

f. Would put a ceiling on expenses of employment which most state agencies would welcome.

It appears from policy that at least one State, Colorado, has an approved plan with a maximum for expenses of employment.(However, they have been told by Federal Court to remove maximum.) (Michigan legislative maximum for expenses of employment were not upheld in the Courts.)

Child Care as an Expense for Employment

It is not clear in State plan material available in Central Office whether, in determining eligibility for a family with incurred child care expenses, child care is deducted as an expense of employment.

It would appear that when child care as an expense of employment is provided as a service, State agencies may fail to recognize child care in determining eligibility.

The Development of a Standard

Many of the State agencies propose that, because of expenditure of time and money and the possibility of court issue, HEW define and develop a standard for expenses of employment. Several States are in court on expenses of employment at the present time. If HEW should assume this responsibility, it would be HEW's responsibility to defend and it would relieve States of the political realities relating to this issue. Should HEW develop area differences? If States should be required to develop their own standard for expenses of employment:

- A study of existing costs could be totally inadequate under present approved plans,
- The standard could be "too loose" or costly under present approved plans.

If States are required to develop a standard for expenses of employment:

- Could a State establish a justifiable money standard for the "items" excluding child care?
- Can the States average if their present plan for expenses is not acceptable?

Requiring each State to develop its own standard would result in fifty-four (54) State differentials. In addition, there is question as to whether States should be permitted to develop area differentials.

Questions to be Answered Prior to Developing Position

- We have taken the position that justifiable standards are acceptable.
- The present analysis of expenses of employment shows inconsistencies in approved plans with 20-7. What are we to do about this? (An actual study of expenses incurred by recipients is costly and time consuming.)
- Many States presently have flat amounts for food, clothing and personal incidentals that are so small that there is question as to whether this was ever justifiable in accordance with the old Handbook.
- If States develop a standard for expenses of employment in Title IV-A, may they use the same standard for all Titles?

Recommendation

It is recommended that HEW define and develop a national standard for expenses of employment. As such, States would be required to meet the standard

as defined; States who elected to provide a State defined standard would have to justify the different standard.

There is no readily available source of information or studies on determining expenses of employment. HEW could assume the leadership role, incorporating the expertise and mutual interest of DOL, USDA and HUD, and develop a national standard that could be of benefit to all agencies concerned.

AMICUS CURIAE

BRIEF

No. 83-1097

IN THE

Supreme Court of the United States

October Term, 1983

MARGARET HECKLER, *Petitioner*,

vs.

SANDRA TURNER, et al., *Respondents*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF AMICUS CURIAE STATE OF NEW MEXICO IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATEMENT OF INTEREST OF AMICUS CURIAE

The State of New Mexico participates in the federal AFDC program. Under the program, dependent children who do not receive adequate financial support through their natural families are provided with assistance through state funds. The state is reimbursed with federal funds for approximately one-third of the benefit amounts and one-half of the operating costs, provided that the State program conforms to federal regulations and is approved by the federal Department of Health and Human Services. In order to qualify for the matching funds, New Mexico was forced to accept and follow the federal interpretation of income calculations for the program. The regulation promulgated as 45 C.F.R. § 233.20(a)(iv)(A), requires that the states, including New Mexico, calculate AFDC benefits considering all mandatory payroll and tax deductions as income to be counted against the benefits provided to a needy child or family. New Mexico thereupon adopted regulations conforming to this and all other federal requirements, and the resulting program received federal approval.

On behalf of the State and as *parens patriae* on behalf of those dependent children and other persons to whom New Mexico provides AFDC benefits, or would provide benefits if income calculations were based on available rather than theoretical income, the New Mexico Department of Human Services brought suit against the federal agency. At issue was the statutory section challenged in the instant case, as brought by Sandra Turner, et al. As here, the suit alleged that the calculation of AFDC benefits must be based on a recipient's available income, rather than on a figure which included mandatory taxes the recipient would never receive or be able to make use of. In that suit, *Goldberg v. Heckler*, No. 84-1218 (10th Cir. April 17, 1984) (order staying appeal), the United States District Court for the District of New Mexico granted summary judgment for the defendant, upholding the federally promulgated regulations.

On appeal to the United States Circuit Court of Appeals for the Tenth Circuit, consideration of the matter has been stayed pending this Court's ruling in the instant case. All parties concurred in the motion to stay proceedings, as that case will necessarily be disposed of by this Court's ruling on the issue presented here.

SUMMARY OF ARGUMENT

The State of New Mexico interprets 42 U.S.C. 602(a) (7) (A) to require that eligibility and benefit calculations must be based on available income, rather than on a gross income figure as urged by Petitioners. This conclusion is reached by several avenues.

At the most basic level, the statute in question has remained intact for over forty years. The historic interpretation has been that the income referred to must be that which is available to the family. Congress has embraced this interpretation over the years, and nothing in OBRA altered the statutory language or legislative intent. The fact that the federal agency promulgated a new interpretation of the statute – which conflicts with the interpretation of other administrative agencies charged with program operation such as *Amicus* here – cannot serve to change the plain and historic Congressional intent.

The goals of the AFDC program also mandate the use of available income for benefit calculation purposes. The program goals, unchanged by OBRA, include encouraging participants to reach financial independence and breaking the cycle of dependency. The gross income interpretation, in contrast, creates a disincentive for recipients to stay working and reach the program goals. An interpretation in direct conflict with the program itself should not be favored.

The long-term interests of both the States and the benefit recipients are best served by the available income interpretation.

The disincentive embodied in the federal interpretation cuts benefits only for those families with an income that approaches self-sufficiency. These families are at the critical stage where financial independence is possible, and a disincentive at this point injures the program at its critical stage. The States also provide job incentive programs which operate cooperatively with AFDC to encourage self-sufficiency through employment. A disincentive from AFDC undermines all of these programmatic efforts.

In the long run, the minimal difference in AFDC benefit payments can be more than offset if even a tiny percentage of the program participants reach independence. New Mexico finds the long range savings of the available income interpretation to be yet another social and fiscal advantage to all concerned. The federal agency's interpretation, in contrast, encourages long term program dependency by participants with both the financial problems and social costs thus incurred.

The arguments put forth by Petitioners and *Amicus* Washington are unpersuasive in the face of Congressional intent, historic interpretation, program goals and the interests of the States and their citizens.

ARGUMENT

A. THE LONGSTANDING POLICY THAT ELIGIBILITY AND BENEFIT CALCULATIONS MUST BE BASED ON AVAILABLE INCOME WAS NOT MODIFIED BY THE BUDGET ACT OF 1981.

1. The statutory section which gave rise to the use of "available income" remains intact.

The central question presented – whether AFDC benefit calculations must begin with "available income" or "gross income" for the determination of recipient benefits – is principally an issue of statutory construction. The statute itself is of little

help, as the facial language is inconclusive without resort to interpretation. The historic meaning given to the language in question, however, as reaffirmed by Congress, is conclusive.

The specific question is whether the term "any other income" in 42 U.S.C. 602(a)(7)(A) refers to income that is available for the child or family, or to the pre-taxed payroll figure of gross income. Respondent's contention, that § 602(a)(7)(A) is to be interpreted as meaning available income rather than gross income, rests on forty years of historic interpretation of the section as carrying that meaning. Even the federal Circuit Court of Appeals decisions which finally disagreed with Respondent's conclusion recognized this historic interpretation. *James v. O'Bannon*, 715 F.2d 794, 802-3 (3rd Cir., 1983); *Bell v. Massinga*, 721 F.2d 131, 132 (4th Cir., 1983).

In deciding the instant case, the Ninth Circuit Court of Appeals recognized not only the longstanding, consistent history outlined above, but measured with it the impact of longstanding application by the administrative agency and periodic reaffirmation by Congress. Since 1940 the Social Security Board and its successors have read § 602(a)(7)(A) to mean income must "actually exist" and be "available to the applicant," or else it cannot be considered income for purposes of the section. Available means "actually on hand or ready for use when needed." *RAM v. Blum*, 564 F. Supp. 634, 638-40 (S.D.N.Y., 1983). This interpretation was adopted officially by all agencies charged with administering the program on federal and state levels.

Congress repeatedly approved this interpretation. In modifying this portion of the Act on at least three occasions, Congress left this particular sub-section intact. The question remaining is whether the meaning of this sub-section was altered by federal regulation, or by the enactment of OBRA.

With the enactment of the Omnibus Budget Reconciliation Act of 1981, Pub.L. No. 97-35 § 2302, 95 Stat. 357, 844-45

(1981), the federal agency for the first time promulgated a rule which effectively switched to gross income, rather than available income, as the basis for AFDC benefit calculations. The agency rule was not made pursuant to any Congressional change in the AFDC program, and violates Congressional intent as expressed over a forty-year history of interpretation and reaffirmation. Respondent and the courts which have found that OBRA embodied a change to gross income-based calculations, rely in part on a perceived change in the interpretation of § 602(a)(7)(A) beginning in 1968.

The federal agency, in 1968, began calculating all of the separate deductions available under § 602 in a single grouped deduction. The new formula embodied the historic interpretation of § 602(a)(7)(A) by counting all mandatorily withheld payroll taxes as deducted from income, in addition to all other deductions. In effect, the new formula subtracted mandatory payroll taxes to reach available income, and thereafter subtracted the various other permitted deductions to reach a "net income figure. All of the subtractions, however, were made at once, in a single expedient step.

Petitioner now relies on the 1968 calculation formula as historic precedent for its new interpretation of § 602(a)(7)(A). *See James v. O'Bannon, supra* at 803-804; *Bell v. Massinga, supra* at 133. This reliance, however, is unfounded. To begin with, the 1968 calculation formula was solely a product of federal agency regulation. An agency, however, is not authorized to substantively alter the Congressionally mandated interpretation of specific legislation. Because the alleged change in fact maintained and applied the historic interpretation – using as always "available income" minus other deductions as a basis for calculation – and because the agency would have been powerless to effect the kind of changes they claim to have made, no new meaning of the section can be inferred. The 1968 regulation simply embodied the previous interpretation of § 601(a)(7)(A).

2. Administrative interpretation of the Act and the agency's "broad rule-making authority" are insufficient to change the available income rule.

Respondent, and the court in *James v. O'Bannon*, *supra*, conclude that the agency's interpretation of OBRA is controlling based on the agency's "broad rule-making powers." The Third Circuit Court concluded that:

> [W]e do not believe that it can be seriously contended that the Secretary's exercise of this power in his decision to classify withheld taxes as work expenses exceeded the parameters of the statutory authority granted by Congress.

James v. O'Bannon, *supra* at 806.

If it could be presumed that the federal agency's interpretation was an uncontroverted reading,[1] the Secretary still remains necessarily bound by the statute. The rule-making power is only as broad as the statute itself. 14 U.S.C. § 1302. Where the statute has been distinctly interpreted with specific meaning, and has thereafter been repeatedly reaffirmed by legislative action, the Secretary is bound by that interpretation.

In short, the historic policy of basing calculations on available income has been reaffirmed by the Congressional refusal

[1] The *James* decision incorrectly presumes a uniform reading by the "administrative agency." The various states and the federal agency are charged cooperatively with administering the AFDC program. In theory, the states themselves are to draft their regulations and policies in conformity with the Social Security Act. The existence of this brief alone signifies that at least some of the agencies charged with interpretation and administration of the program statutes disagree with the federal interpretation. Although the federal agency retains the financial clout to impose its interpretation, the resulting conformity should not be construed as acquiescence or approval by the various states. There is, in fact, no conclusive or uniform reading of the section accepted by the agencies charged with its administration. New Mexico, at least, interprets "income" in § 602(a)(7)(A) to mean available income.

to modify or alter the specific language of § 602(a)(7)(A). The federal agency is bound by that clear intention and interpretation by Congress.

B. THE GOALS OF THE AFDC PROGRAM EMBRACE AND SUPPORT THE CONTINUED USE OF "AVAILABLE" INCOME IN DETERMINING BENEFITS.

1. The AFDC program is aimed at encouraging the parents of needy children to find and maintain independent financial resources for that child's support.

The purposes underlying the AFDC program are embodied in the statutes themselves and in the interpretive case law:

> The AFDC program is designed to provide financial assistance to needy dependent children and the parents or relatives who live with and care for them.

Shea v. Vialpando, 416 U.S. 251, 253 (1974).

The financial assistance is designed:

> [T]o help such parents and relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection.

Shea v. Vialpando, *supra* at 253 (quoting 42 U.S.C. § 601.).

Since 1962, the AFDC objective of helping the parents of dependent children attain self-sufficiency has been encouraged through a complicated and often modified system of related financial incentives and work programs. *Shea v. Vialpando*, *supra* at 254; *James v. O'Bannon*, 715 F.2d 794, 808-9 (3rd Cir. 1983). Unless the goals of the AFDC program, including a breaking of the welfare dependency cycle, were changed by the Budget Act of 1981 (OBRA), they remain central to the statutory objectives and purposes of the program.

Citing *Philadelphia Citizens in Action v. Schweiker*, 689 F.2d 877, 879 (3rd Cir., 1982), the Third Circuit Court of Appeals found that the primary purpose of the OBRA amendments to AFDC were to eliminate benefits for the less needy, distinguishing these from the very needy who would retain benefits. *James v. O'Bannon*, 715 F.2d 794, 808-9 (3rd Cir., 1983). Another purpose underlying the OBRA enactments is that they were implemented to save money. This second purpose is undisputed.

Relying on these purposes, the Court in *James*, *supra*, drew the conclusion that OBRA changed the basic goals and objectives of the AFDC program. This conclusion is unwarranted in light of the OBRA enactments themselves, and the nature of budget cuts vis-a-vis the comprehensive programs they affect.

A program such as AFDC maintains its own integrity and exists as a body of programmatic laws with one or more goals and objectives. A budget act such as OBRA consists of a series of amendments, individual in nature, which alter or restate the specific clauses of the program statutes. A series of budget measures may, by overall effect, drastically reduce the program budget while increasing some expenditures to partially replace others that have been wholly abolished. In short, a budget act must be read on its face, where a program statute is generally read in terms of its objective. *See Shea v. Vialpando*, *supra* at 253.

OBRA was aimed largely at cost savings. The principle savings in AFDC were accomplished on a grand scale by the "150% Rule." [§ 602(a)(13)][2] In New Mexico, for example, the 150% Rule eliminated 6% of the recipients from AFDC

[2] The "150% Rule", as implemented through OBRA, effectuates a policy that any family whose income is over 150% of that family unit's calculated standard of need becomes automatically ineligible for AFDC benefits.

rolls, and cut AFDC benefit costs to the federal government by approximately 3% or $2,242,824.00 over the first year.[3] To a less significant degree, a new system of benefit calculations also saved money. Work and child care expenses were capped at $75 and $160 respectively [§ 602(a)(8)(ii)(III)], and the "work incentive disregard" of $30 plus one-third, subtracted from the recipient's income, was reduced [§ 602(a)(8)(iv)]. This latter disregard is now computed after all other expenses are subtracted from income (leaving the one-third income benefit to participants at a correspondingly smaller amount) and is available only during the first four months of eligibility. The larger disregard previously was available to all recipients in the program. The entire savings obtained by these new income calculations, even when the federal "gross income" regulation at issue here is applied, amounts to less than one-tenth the savings achieved by the 150% Rule.[4]

Principally on the back of the 150% Rule, OBRA reached its goal of significant cost savings, regardless of the interpretation given § 602(a)(7)(A). Without any statement or indication of more specific intent, it cannot be presumed that beyond the 3% savings of the "150% Rule," the additional savings of the work incentive disregard, and caps on work and child care expenses, that the Act intended to change benefit calculations to gross income and further restrict benefits.

[3] Figures are based on the New Mexico Department of Human Services, Income Support Division's *Impact of the Omnibus Reconciliation Act on AFDC Program*, Report compiled June 1, 1982, (five months after program changes under OBRA took effect) and projected through that calendar year.

[4] Based on the figures of the same fiscal impact report as in note 3, *supra*, the work and child care caps, diminished $30 and one-third disregard and "gross income" based calculation combined for a total savings of $110,740.00 or .014% for the program.

Even if OBRA sought to eliminate benefits for the "less needy" (*James v. O'Bannon*, *supra* at 809), it is unclear how the Act was intended to affect the very needy persons remaining on the rolls. The point is that given the cost savings of the 150% Rule, the additional purpose of the amendments must be determined by a reading of each. The seventy-five dollar business expense figure, for example, benefits some recipients at governmental expense, and penalizes others to the agency's financial advantage. Similarly, and more explicitly, OBRA's provisions for additional "work programs" will cost the federal and state governments, yet they were created and implemented through the budget act itself. Although at least one of OBRA's objectives was to save money, that objective cannot be seen as a purpose by which to explain and interpret every aspect of the amendments.

Finally, to the limited extent that cost savings are an aid to interpreting OBRA, the federal agency's analysis is incomplete. The objective of saving money is not confined to immediate gratification. In practice, the federal regulation may well result in significantly greater long range program costs.[5] A short-term view of "savings" cannot adequately guide statutory interpretation.

The undiscriminating analysis that all OBRA terms must be read to reduce recipient benefits in every respect is too narrow to provide guidance. Each aspect of the Act must be viewed on its own language. As the purpose of the AFDC program was retained intact by OBRA, any unclear portion of the Act must now be interpreted under that continuing set of goals and objectives.

[5] *See discussion infra at pp. 20-22.*

2. The "gross income" interpretation embodies a specific disincentive against gainful employment by a needy child's parent in direct conflict with the AFDC program goals.

The purpose of the AFDC program, in helping the parents of needy dependent children "to attain or retain capability for maximum self-support and personal independence. . ." is uncontroverted. *Shea v. Vialpando*, 416 U.S. 251, 253 (1974). The interpretation of § 602(a)(7)(A) urged by petitioner, however, creates a disincentive for recipients to work when contrasted with the "available income" formula that has been applied historically. *James v. O'Bannon*, *supra* at 808.

The "gross income" analysis results in a proportional decrease in realized income for every dollar a recipient parent earns when compared to his or her realized income under the "available income" formula. The impact of the defendant-appellant's interpretation is to create a new and greater disincentive against recipients working, or seeking higher wages. The result of the federally imposed regulations are thus to discourage the parents and relatives of needy children from attaining or retaining the capability for self-support, at least to the extent those regulations differ from the "available income" calculations.

If the parent of dependent children earns, for example, minimum wage salary for perhaps the twenty hours each week that her older child is in school, paying child care for the younger child during that period, the disincentive is problematic. A parent in this situation is working in conjunction with the AFDC benefit schedule. Basically, her family "need" is determined. After four months of AFDC participation any money she earns is subtracted directly from the monthly need total she is to receive. In short, working gets her no further ahead than does staying home.

Under the new federal interpretation, however, the problem is much worse. Every dollar she receives in gross pay is still counted against her benefit level. In addition, she does not ever receive the amounts withheld in taxes, and thus receives as a monthly total an amount equal to the AFDC determined need amount minus withheld taxes. The taxes withheld are effectively a penalty for working, as without working, the mother would receive that much more income each month.

The federal regulations work in direct opposition to the AFDC objectives and purpose. An interpretation with this effect cannot be favored, and should not be construed where Congress, in the amendments themselves, took significant steps to create work incentives for the program participants.

C. THE POLICY OF THE AFDC PROGRAM AND THE NEEDS OF THE PEOPLE OF NEW MEXICO ARE BEST SERVED BY THE "AVAILABLE INCOME" INTERPRETATION.

1. The disincentive created by the federal agency's use of "gross income" undermines the objective of a state AFDC program.

   a. The disincentive strikes hardest at those dependent children whose parents are attempting to work their way off the AFDC rolls.

A small portion of the families receiving AFDC benefits are affected by the federal agency's new "gross income" calculations. The impact of mandatory wage withholdings on persons eligible for AFDC benefits is generally minimal, as the low incomes and correspondingly low tax brackets of most AFDC households keep their taxes at the lower levels. In New Mexico, for example, the average loss in recipient benefits which results from the inclusion of taxes in the AFDC income calculation is a loss of about twenty dollars ($20) each month, and this is only to the affected family who is still eligible for

benefits.[6] Of course, for the families who are pushed over the maximum income level of eligibility by the addition of taxes to their income, the resultant monthly loss is not only the thirty (30) or fewer dollars they received in benefits, but the cost of discontinuance from Medicaid as well.[7]

It is important to note that families with no income, or who have an income below the minimum level, are not affected by either interpretation because they receive the maximum benefits under either calculation.[8]

The families who are affected then, are those families where the employed parent is making enough money to count against the benefit level, but is making too little to be entirely self-supporting. These families are in the critical bracket between those who have dropped out of the work force entirely and those who already earn enough to be self-sufficient. The

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[6] These figures are based on the ninety percent of New Mexico recipient families which include less than five children; the New Mexico AFDC benefit schedule, Program Manual Regulations at 220.001-221.854 as amended through May 1, 1984; and taxes including FICA withheld at 6.7%, and the corresponding state and federal tax withholding schedules for 1984.

[7] In addition to AFDC benefits, program participants eligible for any AFDC benefits receive full Medicaid coverage for family members. The average participant Medicaid expenditures in New Mexico for 1983, according to the Department of Human Services statistical breakdown was: for a family with one child – $90.62/month; for a family with two children – $115.36/month; for a family with three children – $164.24/month. Each additional child in larger families required an average of $24.44/month in Medicaid expenses.

[8] Families who have a § 602(a)(7)(A) "income" calculation which is under their minimum for that size family receive maximum benefits. If the family income falls below the minimum under both the "gross income" and "available income" interpretations, the interpretation used does not affect them. For New Mexican families with one child, the unaffected families are those with monthly incomes of $140.00 and below. Families with three and four children are unaffected if their incomes are less than $310.00 and $380.00 respectively.

tenuous position of these working parents is at all times a struggle between quitting work, staying with the kids and relying forever on benefits, or holding on to the job until they can raise their hourly or weekly salary and become independent. If the AFDC program can encourage anyone to become financially independent, it will be these marginal income-earners who are close to working themselves out of the hole.[9]

The federal agency's interpretation, however, provides such working parents with a further incentive to slip back into the pool of total benefit dependency. The "gross income" interpretation, for each affected family, means they take home between ten (10) and thirty (30) dollars less each month than they would under the available income reading. This twenty or so dollars may well make the difference between staying at home on benefits, or staying at work until the salary or hours increase and allow independence. New Mexico counts these minimal dollar amounts for recipients trying to hold jobs as dollars well spent.

For the recipients who are entirely cut off from their minimal assistance and medical benefits because the "gross income" interpretation pushes them over the maximum income level for the program, the analysis is similar, although the effects are more severe. If the state can provide medical assistance as a backup to families who have almost pushed themselves otherwise entirely off the welfare system, and thereby make it possible for such people to stay independent, the money has been well spent. The existence of this small push in support of the

[9] Using a 6.7% FICA withholding, with the New Mexico and federal tax withholding schedules, a parent with one child would have to make over $340.00 to have thirty dollars withheld. This income would cancel the family out of the program for lack of need. Similarly, no families with less than four children could have more than thirty dollars withheld and remain eligible for the program. A family with four children could conceivably have $34.17 withheld and still qualify for limited benefits.

few program participants near enough to self-sufficiency that they may actually attain it, is at the heart of the AFDC program goals. If the federal agency regulation which provides a disincentive only to this group is followed, the program will undermine its own goals at their most critical stage.

b. The federal agency's interpretation cuts against work incentive programs currently employed by the states.

The disincentive created by the federal regulations on income calculations impact adversely on not only the program itself, but on the effectiveness of other state and federal projects. Generally, states either operate or participate in a number of work incentive programs which dovetail with AFDC support in encouraging families to work their way off the public benefit rolls.

In New Mexico, for example, the Work Incentive Program (WIN) was provided for under OBRA itself, and is operated locally by the New Mexico Department of Human Services and the New Mexico Employment Security Department together. The purpose of the WIN program is to make the search for employment a condition of continued AFDC participation. A disincentive to work that results from lessened support for those AFDC recipients who are working, undermines the WIN objective. If the result of working and marginal AFDC assistance is to make the working hours provide smaller returns, the participants will find the work itself to be a correspondingly poorer choice in contrast to unemployment and full public benefits.

Similarly, New Mexico operates a "day care" program for AFDC recipients, partially underwriting the cost of supervision of the children of working parents. This program, supplemented with partial AFDC benefits until the wage-earner receives enough salary to become independent, is also frustrated when

the support to working recipients is cut back by a "gross income" interpretation.

The Community Work Experience Program (CWEP) is being run on a demonstration basis in one county of New Mexico. This program involves the retraining of parents who will soon go off the AFDC rolls. The objective is to make it possible for these recipients to join the workforce once their children become independent. Unless AFDC can offer sufficient support during the work-training period, these previously unskilled recipients will be encouraged to ignore this one inexpensive chance to learn a skill, and will remain unemployable thereafter.[10]

The incentive of adequate support during the critical work-finding stage is important enough that the New Mexico Departments of Human Services and Employment Security have initiated a joint "Work and Welfare Task Force" to study and enhance work incentives. Every incentive program supplementing AFDC depends on adequate support and incentive from that program as well. The ability of these incentive programs to help and encourage recipients to work and to end reliance on public benefits rests in part on a simultaneous incentive from the AFDC program to keep working. The federal regulations which instead create a disincentive to these working recipients not only conflict with the program goals themselves, but help destroy the effectiveness of the other similarly directed state and federal programs.

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[10] The critical role of work incentive programs in the AFDC scheme, and for benefit recipients generally, is discussed at length and analyzed in: B. Toomey, *Work Ethic and Work Incentives: Values in Income Maintenance Reform*, Ann's Paper; Society for the Study of Social Problems; Ohio State Univ. (1979); *See also, National Alliance of Business, Explanation and Analysis of the Job Training Partnership Act of 1982* (as Revised 1983) *generally and* at pp. 39-41; M. Rein, *Determinants of the Work-Welfare Choice in AFDC*, The Social Service Review (1972).

c. The effects of the federal disincentive run deep and may permanently injure both the program participants and the financial interests of the states.

The immediate costs of the agency interpretation – diminished benefits to individuals and a disincentive to work one's way off the program rolls – are significant. The long-term effects, while somewhat more speculative, are no less critical to the analysis.

The wage-earner, facing this disincentive, may well return to the pool of full dependency on public welfare if it is no longer worthwhile to retain a marginal job. For the now unemployed worker, this has been a major step back. The effort required to escape total reliance on benefits is now that much greater, and less likely to be undertaken. In the extreme case, the disincentive has created a lifetime welfare dependent from what would have been a partial benefit recipient striving for self-sufficiency, and perhaps reaching it on a permanent basis.

The children suffer on different levels. The difference in benefits may mean a resultant loss in educational opportunity, in the clothing that affects self-image, or simply in the lack of nutrition which touches on lifelong development. On a second level, the child is deprived of a working, striving parent as a role model, and may be given a welfare dependent model to emulate instead. While hard to determine, the costs to a child in these terms far outweigh the dollar expenditures involved.

The various states themselves are affected in social and financial terms. The social costs are described in terms of the parents and children: adults on the welfare rolls rather than working, and children with diminished chances to reach their potential and lacking productive role models. On the financial end, the costs involved are also significant. The difference between a twenty (20) dollar monthly supplement until self-sufficiency is reached, and a lifetime on public benefits may be

several thousand to one in outlays.[11] If only one parent in one thousand is not discouraged by this federal disincentive and reaches financial independence through program support, the savings are significant overall.

The AFDC program exists to meet this need and encourage those persons who can break the cycle of dependency to do so. If shortsighted federal efforts to save twenty-dollars-a-head prevail, a severe blow to those people within reach of independence has been dealt, the program will be weakened at its critical stage, and the groundwork of incentive will befrustrated.

New Mexico as a state and on behalf of its citizens, cannot read the AFDC statutes in this manner to preclude their intended purpose.

2. **Administration of the AFDC program under the "available income" interpretation is neither an irrational approach by, nor a penalty against, the agencies charged with its maintenance.**

   a. **The available income interpretation is in accord with Congressional intent.**

Petitioner California contends baldly that the "available income" analysis "frustrates congressional intent." California Brief at 7. This presupposed conclusion begs the question itself. The core of the issue, at least in part, is the intent of Congress in maintaining the AFDC program under its current statutory scheme. The Petitioner's analysis is only slightly deeper than

[11] The maximum monthly difference in AFDC benefits between the "gross income" and "available income" interpretations of §402(a)(7)(A), for a New Mexico family with two children during the first four months after losing work is $18.00. The cost of keeping that same family on full benefits for six years, for example, is $18,216.00 [$250 basic needs x 72 months]. The six year figure does not include an additional $8,305.92 in Medicaid benefits that the family will also consume.

the conclusory allegation. California notes that OBRA was a budget cutting act, and presumes from this that every aspect of the act must be interpreted in order to create an ever greater savings. The content of the act, however, is more complicated than the blind swing of a budget axe. As noted by the Court in *James v. O'Bannon*, 715 F.2d 974 (3rd Cir. 1983), OBRA brought with its budget cuts a series of additional financial expenditures for job finding programs. *James v. O'Bannon*, *supra* at 809. If anything can be drawn from this, it is that Congress sought to keep the program integrity alive, with the particular objective of minimizing the work disincentive aspects of the budget cuts. Similarly, with each amendment eliminating the "less needy" recipients from the program, the program sought to maintain a work or job-finding incentive. For example, the $30 and 1/3 disregard was retained in diminished form, and for a four month period only. The reinforced incentive is to retain support for those who lose work but to actively discourage a long stay on the recipient list. In short, a part of OBRA was aimed at encouraging recipients to secure and maintain work. This is hardly surprising in light of the AFDC goals in that regard. Both the California approach, which claims OBRA to be a blind and one-dimensional approach to the programmatic budget problem, and the *James* decision, which concludes that AFDC no longer is concerned with financial work incentives, are contradicted by such OBRA measures as the four month $30 and 1/3 disallowance. Each section must be read on its current terms, and in light of the stated purpose of the amended AFDC statutes.

   b. **The claim that the available income interpretation amounts to a penalty imposed on the various states is no more than a statement of political perspective.**

As *Amicus*, Washington State claims it has been "penalized" by the available income analysis. Stated another way, the State of Washington, since *Turner v. Prod* was decided by the Ninth

Circuit Court, has had to provide slightly increased benefits to needy children and their families – if they choose to continue participation in AFDC. Unless the entire AFDC program is properly seen as a penalty to the State (rather than as a benefit to the State's needy children), then the increased benefits since *Turner* are not a "penalty." Certainly Washington is not being punished in that it now provides slightly greater benefits to its needy citizens under the AFDC program.

c. Nothing in the available income interpretation would significantly lessen or strengthen federal control over the various states.

The State of Washington suggests that the available income analysis renders them "merely an administrative arm of the federal agency." Aside from conflicting with its initial argument that the federal agency's interpretation should be binding on the states implying that uniformity is desirable (Washington Brief at 11-12), this contention is unfounded. As long as the state programs must meet federal guidelines and receive federal approval, the states are tied to every federal decision – except as here, where the federal regulation departs from the statutes and a suit is filed. The role of the State vis-a-vis the federal agency remains the same under either interpretation of income.

d. The historic application of the available income interpretation is neither illogical nor irrational in application.

Respondent California contends that application of the available income interpretation is illogical. Citing the disparate benefits received by persons working at home and persons working in jobs where taxes are withheld (assuming equal income), the conclusion is that this result proves the interpretation irrational. To begin with, the quarterly reporting of home income, and quarterly tax payments work to minimize this disparity. Furthermore, the disparate benefits for persons thus

situated have existed under the AFDC program at least since enactment of the first § 602(a)(7)(A) in 1939. Congress has not seen fit to resolve this distinction except to modify the tax provisions over the forty years between enactment and 1982. It is safe to say that Congress has not focused on the illogic of the situation as it exists under the available income interpretation.

On a second level, persons in these two groups are treated differently under several areas of the law. People who have taxes withheld, for example, lose use of that money during the year, while people working at home can deposit the same amount and draw interest on it. This is a substantive distinction that exists due to the tax laws, and is a legitimate distinction of historic character which has not rendered the AFDC statutes unworkable over their four decades. To claim this "irrationality" as a basis for changing the terms or meaning of § 602 (a)(7)(A) is ill-founded.

In short, the various policy and collateral legal arguments put forth by Respondent California and *Amicus* Washington are either unfounded, or based on premises which presume their ultimate conclusion. The arguments thus presented blur the issue rather than aid in its resolution.

CONCLUSION

The Ninth Circuit Court of Appeals decision in this case is founded on logical and historically sound premises. The "available income" interpretation not only better serves the AFDC program goals and objectives, but it is in accord with Congressional intent as demonstrated through the OBRA work incentive programs and the consistent forty (40) year interpretation of § 602(a)(7)(A) to that effect. For these reasons, New Mexico respectfully urges that this Court affirm the Ninth Circuit's decision.

For all of the reasons discussed, *Amicus* New Mexico submits that the federal agency exceeded its authority in promulgating

the regulation in question. New Mexico agrees with the Ninth Circuit Court, that the only historically approved and programmatically consistent interpretation is that eligibility and benefit calculation must be based on a participant's available income.

Respectfully submitted,

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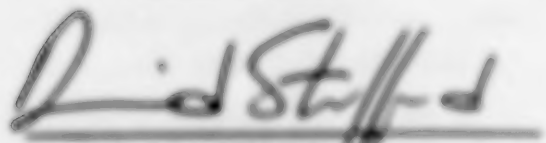

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July 20, 1984

RESPONDENT'S

BRIEF

No. 83-1097

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES,
Petitioner,

vs.

SANDRA TURNER, et al.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether Section 402(a)(7)(A) of the Social Security Act, 42 U.S.C. § 602(a)(7)(A) (Supp. V 1981), prohibits the states, which administer the Aid to Families with Dependent Children (AFDC) program, from treating the amount of a working recipient's tax withholdings as income actually available to meet a family's current support needs.

PARTIES TO THE PROCEEDING

In addition to the parties named in the caption, Debra Scruggs, Jerrylean Baker and the California Coalition of Welfare Rights Organizations, on behalf of themselves and all others similarly situated, were appellees in the Court of Appeals. State appellants in the Court of Appeals were Marion J. Woods and his successor, Jerold Prod, Directors of the California Department of Social Services; Kyle McKinsey, Deputy Director of the California Department of Social Services; the California Department of Social Services; Mary Ann Graves and her successor, Michael Franchetti, Directors of the California Department of Finance; and the California Department of Finance. At the present time, Linda G. McMahon is the Director of the California Department of Social Services and Jesse R. Huff is the Director of the California Department of Finance. The original federal appellant in the Court of Appeals was Richard Schweiker, then Secretary of Health and Human Services.

TABLE OF CONTENTS

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

Table of Authorities Cited

Cases

Table of Authorities Cited

Cases

TABLE OF AUTHORITIES CITED

CASES

Statutes

TABLE OF AUTHORITIES CITED

STATUTES

Regulations

Other Authorities

OTHER AUTHORITIES

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BRIEF FOR AFDC RESPONDENTS

STATEMENT TO THE CASE

Sandra Turner and the class of AFDC recipients represented by her and others (hereinafter AFDC Respondents) submit this statement to correct certain inaccuracies or omissions in the statement prepared by the Petitioner Margaret M. Heckler, Secretary of Health and Human Services.

This case concerns the method used by the State of California and the federal Department of Health and Human Services (HHS) to compute AFDC eligibility and benefits for needy families with some outside income from employment. Both the district court and the court of appeal below held that tax withholdings are not income available to meet the basic subsistence needs of a poor family and therefore cannot be a basis for denying or reducing a family's monthly public assistance grant.

Like the tax laws, terms in the AFDC program have specific statutory meaning. Here the issue concerns the definition of "income" under Section 402(a)(7)(A) of the Social Security Act, 42 U.S.C. § 602(a)(7)(A) (Supp. V 1981). The answer to this question determines whether a family is eligible for public assistance and, if so, the amount of aid it will receive.[1]

As with tax policy, legislation governing the AFDC program excludes from consideration as income certain

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[1] In California, financial eligibility for AFDC is determined by comparing a family's "income" under Section 402(a)(7)(A) with state-established standards of need for families of different sizes. Once found eligible, households where there are no working recipients typically receive state-established maximum aid payments, which also are based on family size. Recipient households with outside income receive grants determined by subtracting from the maximum aid payment schedule the amount of income attributable to the family according to various statutory provisions. Calif. Dept. of Social Services, Eligibility and Assistance Standards (EAS) § 44-315.4 (January 1, 1984). California maximum aid payments are identical with the amounts specified as standards of need except for families of nine members or more. Cf. Calif. Welf. and Inst. Code §§ 11450 and 11452 (West Supp. 1984).

forms of compensation. The tax laws, for example, do not treat medical insurance premiums paid by the employer for the benefit of the employee as reportable income for the employee. Internal Revenue Code of 1954, 26 U.S.C. § 106 (1976). In the AFDC program, the comparable policy is rooted in the principle of actual availability as recognized by this Court in *Van Lare v. Hurley*, 421 U.S. 338, 95 S. Ct. 1741, 44 L. Ed. 2d 308 (1974), *Lewis v. Martin*, 397 U.S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561 (1970) and *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968). This principle holds that a potential source of revenue is not income for AFDC purposes unless it is actually available for the support and maintenance of the family. 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983).

The lower courts in this case based their decision in favor of AFDC Respondents on the longstanding policy and practice of using "take home pay" to determine the income actually available to an AFDC household with working recipients. They found no support in the legislative and administrative record for the Secretary's contention that the regulation defining "accrued income" as used in Section 402(a)(8) of the Social Security Act, 42 U.S.C. § 602(a)(8) (Supp. V 1981), constituted a substitution for or a limitation on the meaning of the term "income" as used in Section 402(a)(7)(A).

The Secretary's argument is based on her interpretation of the $75 "work expense" disregard enacted by the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97-35, § 2301, 95 Stat. 357, 843, 42 U.S.C. § 602 (a)(8)(A)(ii) (Supp. V 1981). In her statement of the case, the Secretary emphasizes certain reporting and administrative practices of the states during the 1970's which grouped mandatory federal and state income tax, social security and state disability insurance withholdings with out-of-pocket, work-related expenses, such as for transportation, meals or uniforms. The Secretary claims that these state agency practices were of sufficient notoriety to establish

congressional awareness and approval of her construction of the new provision. The courts below considered such ministerial practices, about which Congress was unlikely to have first-hand knowledge, unpersuasive evidence of congressional intent in 1981. They also underscored that these practices had changed in the 1970's and were not themselves evidence of any change in congressional intent from that previously expressed in the 1939, 1962 and 1967 amendments to the Social Security Act.

Having carefully considered the historical record from 1939 through 1981, the courts below refused to nullify an over forty-year, congressional policy of using take home pay to determine AFDC eligibility and benefits since they found no evidence of its explicit or implicit repeal, either as part of OBRA or earlier. The lower courts therefore rejected the Secretary's proposition that, with respect to mandatory payroll tax withholdings, the 97th Congress repealed *sub silentio* the actually available income principle established in 1939 by the 76th Congress.

SUMMARY OF THE ARGUMENT

In this brief, AFDC Respondents show that the Secretary's policy of treating mandatory payroll tax withholdings as income available to meet the subsistence needs of AFDC families violates the Social Security Act's longstanding requirement that only income actually available for current use be considered in determining AFDC eligibility and benefits. This requirement has been repeatedly endorsed by Congress and by this Court in the years since its enactment in 1939. Social Security Act Amendments of 1939, Pub. L. 76-379, § 401(b), 53 Stat. 1360, 1379 (Part 2) (1939).

The precise statutory issue concerns the meaning of "income" in Section 402(a)(7)(A) of the Social Security Act, 42 U.S.C. § 602(a)(7)(A) (Supp. V 1981). This issue now arises as a point of contention because Congress, as part of the Omnibus Budget Reconciliation Act of 1981

(OBRA), Pub.L. 97-35, 95 Stat. 357 (1981), deleted a previous "work expense" provision specified in Section 402(a)(7), and added to Section 402(a)(8)(A) a standardized "work expense" deduction of $75 for full time workers and a lesser amount at the discretion of the states for part time workers. Pub. L. 97-35, §§2301 & 2302, 95 Stat. 357, 843-844 (1981), 42 U.S.C. §602(a)(8)(ii) (Supp. V 1981).

The Secretary contends that the impact of this OBRA change was to create an exception for "earned income" to the actually available income requirement of Section 402(a)(7)(A). Since the legislation on its face did not establish such an exception, and since "income" under Section 402(a)(7)(A) for over forty years had included only income currently in-hand to meet a family's support needs, the courts below rejected the Secretary's construction of Section 402(a)(7)(A).

In affirming the district court's decision, the court of appeals found no basis for concluding that Congress had repealed, in 1981 or earlier, the policy of excluding amounts withheld for taxes from consideration as a source of support for a needy family. *Turner v. Prod*, 707 F. 2d 1109, 1116, 1121 (9th Cir. 1983) (Supp. App. 16a, 28a).

The practical expression of this policy involved counting only "take home pay" when determining a poor family's eligibility and benefits under the AFDC program. This policy's application insured that income and resources attributed to a needy family were *not* fictional or over-stated. The policy itself was based on the principle of actual availability, which defines the scope of the "income and resources" clause of Section 402(a)(7)(A). *See Lewis v. Martin*, 397 U.S. 352, 355, 90 S. Ct. 1232, 25 L. Ed. 2d 561 (1970).

Besides the 1939 and 1981 amendments to the AFDC program, the court of appeals also examined the Public Welfare Amendments of 1962, Pub. L. 87-543, § 106(b), 76 Stat. 172, 188 (1962) and the Social Security Amendments of 1967, Pub. L. 90-248, § 202(b), 81 Stat. 821, 881 (1968).

The 1962 amendments established the "work expense" provision revised by Congress in 1981. The court of appeals found that the purpose of the 1962 provision was to require the states to give credit for out-of-pocket work expenses only optionally considered previously. *Turner v. Prod, supra*, 707 F. 2d at 1118 (Supp. App. 21a). Its purpose was not to cover mandatory payroll taxes, which already were excluded from consideration as income not actually available to recipients. *Ibid* at 1120 (Supp. App. 27a). Rather, its purpose was to insure that in all respects working recipients were not worse off than non-working recipients. The OBRA change amended only the "work expense" provision added in 1962, not the "income and resource" provision which dates back to 1939. Given the limited purpose of the 1962 provision, there is no historical basis for interpreting the OBRA amendment as covering taxes mandatorily withheld.

The 1967 amendments do not bear directly on the central issue in this case, but the Secretary's reference to them has become a source of confusion. The 1967 amendments, in part, established a new "work incentive" disregard as an *additional* exclusion from income. This "work incentive" disregard became part of Section 402(a)(8) of the Social Security Act. *Social Security Amendments of 1967, supra*, § 202(b), 81 Stat. at 881. It was designed to increase the financial grant to working recipients and thereby encourage AFDC recipients to work. Congress did not intend, as the Secretary now argues, that the relationship between Sections 402(a)(7) and 402(a)(8) established by the 1967 amendments meant that the disregards required by Section 402(a)(8) were a substitute for those specified in Section 402(a)(7). These sections had distinctively different purposes.

In sum, the legislative history of the Social Security Act, as it applies here, indicates that the definition of "income" in Section 402(a)(7)(A) has not changed since the 1939 amendments; that the use of the term "income" in Section 402(a)(7)(A) requires that mandatory payroll

taxes be excluded apart from any calculations under Section 402(a)(8)(A); and that the provisions of Section 402(a)(8)(A), including the $75 standardization of work expenses, involve additional amounts to be excluded when determining AFDC eligibility and benefits.

The treatment of mandatory payroll taxes separate from work expenses within the discretionary control of AFDC recipients was not one that courts had to address before OBRA, since amounts withheld for taxes never before adversely affected an AFDC family's entitlement to aid. As required by the 1939 amendment to the Social Security Act, the states had consistently deducted mandatory payroll taxes from income prior to the final AFDC grant determination. The issue arises now not because of any action taken by Congress in enacting OBRA, but because of the gloss on congressional action imposed by the Department of Health and Human Services and adopted by the California Department of Social Services.

This past month Congress passed a new amendment to the AFDC program, which may have a bearing on the prospective effect of a decision on the merits by this Court. Deficit Reduction Act of 1984, HR 4170, § 2625, 130 *Congressional Record* H6552 (June 22, 1984), Pub. L. 98-369, § 2625 (July 17, 1984). This amendment adds a definition of "earned income" to Sections 402(A)(8). In light of this change, the impact of which is uncertain, the Court may want to consider dismissing the writ of *certiorari* as improvidently granted.

If the Court chooses to decide this case on the merits, it should affirm the decision of the court of appeals. The Secretary's contrary conclusion ignores or minimizes the history and purposes of the provisions under review. It requires this Court to find that, at some point never specifically identified, Congress repealed by implication a long-standing policy of using "take home pay" to determine available sources of support for a needy family.

This Court repeatedly has stated that repeals by implication are strongly disfavored. *TVA v. Hill*, 437 U.S. 153, 189, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); *Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936). To the extent there is a conflict in statutory provisions, the applicable principle of statutory construction requires the courts to reconcile the provisions except where they are clearly repugnant. *Morton v. Mancari, supra*, 417 U.S. at 551. The Ninth Circuit's thoughtful decision fully demonstrates the compatibility of the actually available income principle as historically interpreted and the new $75 "work expense" disregard. The legislative record in this case does not support the extraordinary finding of a repeal by implication.

ARGUMENT

I

INTRODUCTION

This case involves questions of statutory construction concerning the determination of eligibility and aid amounts for the working poor under the Aid to Families With Dependent Children (AFDC) program established by the Social Security Act of 1935, 42 U.S.C. §§ 601 et seq. (1976 & Supp. V 1981). The specific issue concerns whether amounts withheld for mandatory payroll taxes must be excluded from consideration in determining AFDC eligibility and benefits because, as required by Section 402(a)(7)(A), 42 U.S.C. § 602(a)(7)(A) (Supp. V 1981), such sums are not actually available to meet a family's current support needs. This statutory principle dates back to the Social Security Act Amendments of 1939, Pub. L. 76-379, § 401(b), 53 Stat. 1360, 1379 (Part 2) (1939). While there have been amendments to other parts of Section 402(a)(7), this particular provision has remained virtually unchanged since its original enactment.

The position of the Secretary of Health and Human Services is that Section 402(a)(8)(A)(ii) of the Social Security Act, 42 U.S.C. § 602(a)(8)(A)(ii) (Supp. V 1981),

as amended by the Omnibus Budget Reconciliation Act of 1981 (OBRA), Pub. L. 97-35, § 2301, 95 Stat. 357, 843 (1981), now provides the exclusive statutory basis for taking into account both expenses associated with employment within a recipient's control—for example, transportation and meal costs—*and* mandatory payroll tax withholdings which are set by statute. Section 402(a)(8)(A)(ii) permits only a flat $75 "work expense" disregard for full time workers. In California, where this case originates, mandatory payroll taxes alone are likely to exceed this amount each month for most working AFDC recipients, thereby leaving no credit for costs of transportation and other work-related expenses. *See* discussion, *infra*, at 36. The State of California supports the Secretary's position.

Because of the injunction issued in this case, which requires California to take into account *separately* mandatory payroll taxes rather than considering them part of the $75 work expense disregard, Cathrine Bass, one of the affected class members, has $84 more each month in spendable income to meet the basic needs of five children and herself than she would have been allowed under the interpretation favored by the state and federal governments. *See* Declaration of Cathrine Bass (Joint Appendix 78-79); *Turner v. Prod*, 707 F.2d 1109, 1122 (9th Cir. 1983) (Brief for Petitioners Supp. App. 31a-33a).

Ms. Bass is still, however, at a distinct disadvantage compared to her pre-OBRA situation, when she would have had, as a result of working, a total of $1002 to spend on her family's subsistence needs after withholdings for tax obligations and paying her work-related expenses. Because she worked, she had prior to OBRA, $231 more than the maximum AFDC grant amount of $771 for a family of six solely supported by public assistance.

After OBRA, under the interpretation of Section 402(a)(7)(A) upheld by the Ninth Circuit, she has $666 after employment expenses and tax deductions to meet the basic support needs of her family, an amount $105 less than that

received by families with non-earners. The Secretary's interpretation would leave her in an even worse financial position with only $582 in spendable income each month for the basic necessities of life. *Ibid.*

There is no question that because of OBRA Ms. Bass' family is in a much worse financial position than before. Under either the lower courts' interpretation or the Secretary's, she is financially better off not working. The issue therefore is not whether OBRA cut-back on financial incentives for employment. It unquestionably did. The issue is the extent to which Congress meant to reduce the discretionary income of AFDC recipients through the enactment of the $75 work expense disregard.

Both the district court and the Ninth Circuit below found after a careful review of the legislative record that neither the text of the Social Security Act nor the Congressional Reports accompanying the 1981 OBRA amendments refer to mandatory payroll taxes as being included within the $75 work expense disregard. *Turner v. Prod, supra*, 707 F.2d at 1119 (Supp. App. 24a); *Turner v. Woods*, 559 F. Supp. 603, 612-613 (N.D. Cal. 1982) (Cert. Pet. App. 40a-41a). Nonetheless, the Secretary maintains that Congress intended them to be within the $75 work expense disregard. The Secretary rests her argument regarding Congressional intent on the overall cost-cutting purposes of the OBRA amendments. She therefore downplays and, at times, distorts the statutory history of the specific provisions amended.

Because she avoids a close contextual analysis of the OBRA changes, the Secretary falsely assumes that at some point prior to 1981, but never specifically identified, Congress limited or repealed the "actually available" principle specified in Section 402(a)(7) as it applies to payroll tax withholdings. The district court and the Ninth Circuit, after an extensive discussion of the pertinent legislative changes in the Social Security Act since 1935, concluded that Congress had not taken any such action explicitly or

implicitly. *Turner v. Prod, supra*, 707 F.2d at 1116, 1121 (Supp. App. 16a, 28a); *Turner v. Woods, supra*, 559 F. Supp. at 610-11. (Cert. Pet. App. 38a-39a). Their conclusion was based on what Congress and the administering agencies had done at the time of each pre-OBRA statutory change regarding the treatment of income received by working AFDC recipients.

The lower federal judiciary is split regarding the issues involved in this case.[3] Those courts favoring the government's position give short shrift to the over forty-year, pre-OBRA legislative and administrative record. In contrast, the district court and the Ninth Circuit in this case fully considered the OBRA changes in the context of previous AFDC legislation, most specifically in 1939, 1962 and 1967. In light of the meaning and intent of these previous amendments as well as the OBRA amendments, they correctly held that the Social Security Act continues to require state welfare departments to exclude from AFDC

[3]*Dickenson* v. *Petit (Dickenson II)*, 569 F. Supp. 636 (D. Me. 1983) (summary judgment for defendants), *aff'd.* 728 F. 2d 23 (1st Cir. 1984), *cert. pet. pending* (filed May 16, 1984); *Bell* v. *Hettleman*, 556 F. Supp. 368 (D. Md. 1983) (summary judgment for defendants), *aff'd. sub nom Bell* v. *Massinga*, 721 F. 2d 131 (4th Cir. 1983) *cert. pet. pending*, No. 83-6299; *James* v. *O'Bannon*, 557 F. Supp. 631 (E.D. Pa. 1982) (summary judgment for defendants), *aff'd.* 715 F. 2d 794 (3rd Cir. 1983), *cert. pet. pending*, No. 83-6168. Other reported lower court decisions are *Clark* v. *Helms*, 576 F. Supp. 1095 (D.N.H. 1983) (summary judgment and permanent injunction for AFDC plaintiffs); *RAM* v. *Blum (RAM II)*, 564 F. Supp. 634 (S.D.N.Y. 1983) (summary judgment and permanent injunction for AFDC plaintiffs); *Williamson* v. *Gibbs*, 562 F. Supp. 667 (W.D.Wash. 1983), appeal pending, No. 83-3725 (9th Cir.) (summary judgment and permanent injunction for AFDC plaintiffs); *Nishimoto* v. *Sunn*, 561 F. Supp. 602 (D. Hawaii 1983), *mem. reversal on other grounds*, No. 83-2214 (9th Cir.) (summary judgment and permanent injunction for AFDC plaintiffs); *Dickenson* v. *Petit (Dickenson I)*, 536 F. Supp. 1100 (D. Me. 1982) (denial of preliminary injunction), *aff'd. on other grounds* 692 F. 2d 177 (1st Cir. 1982); and *RAM* v. *Blum (RAM I)*, 533 F. Supp. 933 (S.D.N.Y. 1982) (preliminary injunction for AFDC plaintiffs).

eligibility and benefit determinations amounts withheld for mandatory payroll taxes as well as the newly enacted $75 work expense allowance.

This Brief reviews this often technical legislative and administrative record to show that the contrary position now advocated by the Secretary is without merit. It begins with the purpose underlying the 1939 legislation, and then considers the effect of the 1962, 1967 and 1981 amendments.

II

THE ACTUALLY AVAILABLE INCOME PRINCIPLE PROHIBITS THE STATES FROM TREATING AMOUNTS WITHHELD FOR MANDATORY PAYROLL TAXES AS PART OF AN AFDC FAMILY'S COUNTABLE INCOME.

The disposition of this case turns on the applicability of the "actually available" income principle contained in Section 402(a)(7)(A) of the Social Security Act to mandatory payroll tax withholdings. The pertinent language of this section reads as follows:

> the State agency shall, in determining need, take into consideration any . . . income and resources of any child claiming [AFDC]. . . .

42 U.S.C. § 602(a)(7)(A) (Supp. V 1981).

Since the above language has not changed since 1939, the most relevant legislative history for analyzing its terms is that surrounding its original adoption. *See Blair* v. *Chicago*, 201 U.S. 400, 453-454, 26 S.Ct. 427, 437-38, 50 L. Ed. 801 (1905). The key issue is the operative meaning of the statutory term "income."

A. The Principle of Actual Availability Has Governed the Meaning of "Income" as Used in Section 402(a)(7) Since the 1939 Amendments to the Social Security Act.

The AFDC program when originally enacted did not require states to consider an AFDC family's income or

resources in determining its monthly grant. The Social Security Act of 1935 made clear, however, that the purpose of the AFDC program was to "furnish financial assistance . . . to needy dependent children." Pub. L. 74-271, 49 Stat. 620, 627 (Part 1) (1935). Accordingly, the Social Security Board, the federal agency then charged with administering the program and a predecessor agency to the present Department of Health and Human Services (HHS), required that states consider the income and resources of a family in determining need. *See Hearings Relative to the Social Security Amendments Act of 1939*, 76th Cong., 1st Sess. at 2254 (hereinafter *1939 Hearings*). This policy was intended to insure that federal and state resources were not expended on families not in need. Congress enacted the 1939 amendment to Section 402(a)(7) to incorporate this administrative ruling into the Social Security Act itself.

The most illuminating portion of the 1939 legislative record is found in the hearing and floor debates. While the comments stressed limiting assistance when families had other sources of support, the discussions emphasized as well the importance of not penalizing families by overly attributing or inflating the income or resources actually available to meet their needs. Representative Poage, for example, was especially concerned that the new income and resources provisions might "be tortured into a warrant to deny some needy . . . person the aid to which he is entitled . . ." 84 Cong. Rec. 6851 (1939). *See also, e.g.*, testimony of Arthur Altmeyer, the Chairman of the Social Security Board, *1939 Hearings*, *supra*, at 2254.

In December 1940, shortly after the enactment of the 1939 amendment, the Social Security Board adopted a policy statement providing that income under Section 402(a)(7)(A) must "actually exist" and must be "available to the applicant," and that "to be regarded as available . . . must actually be on hand or ready for use when it is needed." Social Security Board Memorandum (December 20, 1940) (J.A. 17-19). In 1942, this policy statement was

made part of the official manual then used to instruct the states on federal AFDC requirements. *Guide to Public Assistance Administration* § 202 (J.A. 21-23). These provisions are the direct antecedents to the current federal regulations governing the treatment of income in accordance with Section 402(a)(7)(A). *See* discussion, *infra*, at 31.

Nothing in either of the Social Security Board's policy statements supports the current federal position that these statements were intended to have a narrow application. *See* Brief for Petitioners 23, 29-30. They are written in general terms to cover all income and resources which might be construed as available to AFDC families. The overarching principle expressed is that non-public assistance support cannot be fictional or over-stated when taken into account. It must be actually available to meet the family's current subsistence needs on a dollar-for-dollar basis. This principle of actual availability is applied across-the-board as the method for determining the treatment of all potentially attributable sources of income to the AFDC household.

For this reason, the Ninth Circuit found that the 1939 amendment prohibited consideration of mandatory payroll tax amounts as well as other forms of non-countable income and resources, even though such withholdings were not as extensive then as now. The Ninth Circuit noted, in particular, that although federal income tax withholding did not begin until 1943,[5] the Federal Insurance Compensation Act (FICA) required payroll withholding as early as 1937.[6] *Turner v. Fred*, *supra*, 707 F.2d at 1114-1115 (Supp. App. 13a). By 1939, the concept of mandatory payroll deductions was an acknowledged part of the New Deal

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[5] *See* Current Tax Payment Act of 1943, Pub. L. No. 78-68, § 1622, 57 Stat. 126, 128 (Part 1) (1943).

[6] *See* Social Security Act of 1935, Pub. L. No. 74-271, § 802 (a), 49 Stat. 620, 636, 42 U.S.C. § 802(a) (1935); *see also* 1939 Internal Revenue Code, 53 Stat. 175, 26 U.S.C. §§ 1400-01 (1939).

social welfare legislation. *See, for example*, this Court's decision in *Helvering v. Davis*, 301 U.S. 619, 57 S.Ct. 904, 81 L.Ed. 1307 (1937), which upheld the validity of FICA taxes and their mandatory deduction from gross earnings. The Secretary has no basis for her present claim that at the time of the original enactment of Section 402(a)(7)(A), Congress and the Social Security Board intended to distinguish payroll tax withholdings from other income not actually available to meet a family's basic support needs. Brief of Petitioner 23, 29-30. Indeed, such a conclusion defies what the court of appeals below characterized as "genuine congressional concern that resources counted against a family be actually available for its use." *Turner v. Prod, supra*, 707 F.2d at 1115 (Supp. App. 13a).

B. Throughout the 1940's and 1950's the States Considered Mandatory Payroll Deductions as Non-Available Income.

Until 1969, no codified federal regulations existed governing the administration of the AFDC program. The applicable federal administrative policies prior to that time are therefore found in various letters and manuals, while actual state practices must be determined largely from periodic federal reports. The documents submitted in this case demonstrate that during the 1940's and 1950's, mandatory payroll deductions of working AFDC recipients were treated differently from employment expenses not deducted from their paychecks.

This documentation consists of federal agency statements urging states to *voluntarily* respond to the "employment expenses" problem. None of these statements ever mentioned mandatory payroll taxes as employment expenses. The first statement was issued by the Social Security Board to all state agencies administering the AFDC program shortly after the July 1, 1941 effective date of § 402(a)(7)(A). Social Security Board State Letter No. 4 (April 30, 1942) (J. A. 24-26). The letter's subject was "Facilitating Employment of Assistance Recipients Through Means of Sound Determination of Need," and it urged states to recognize that employed persons have additional needs that must be taken into account, such as additional clothing and transportation required by their jobs.

This policy statement was made part of Section 3140 of the *Handbook of Public Assistance Administration (Handbook)*, the manual used by the federal government between the mid-1940's and the late 1960's to instruct states on federal AFDC requirements. *See e.g., Handbook* §3140 (March 11, 1957) (J. A. 27-29). It was retained in an identical form through the June 1962 revision of the *Handbook* (*see* J. A. 37-38). By 1962, payroll tax withholdings unquestionably represented a significant deduction from the income of working recipients.

These *Handbook* provisions authorized but did not require the states to take into account additional costs of employment for items such as food, clothing and personal incidentals in arriving at the net income attributable to an AFDC household. It is particularly noteworthy that this material did not explicitly refer to mandatory payroll taxes as items subject to discretionary consideration by the states.

In a special public assistance report issued in early 1961, the Department of Health, Education and Welfare (a successor agency to the Social Security Board) reviewed current state policies regarding the treatment of income. *See* "State Methods for Determining Need in the Aid to Dependent Children Program," Public Assistance Report No. 43 (March 1961) (J. A. 30-36). The Report found that the states across-the-board used the term "gross income" to refer to "take-home pay" after payroll deductions. Report No. 43, *ibid*, at 34. In other words, "take home pay" had become the core concept for determining actually available income from recipient earnings.

The Report also found that the states were not consistently taking into account other expenses associated with employment. Those which did take into account costs of

transportation and the like termed the resulting figure "net income." At the option of the states, this figure rather than "gross income" was the basis in some states for determining the amount of aid for a household with working recipients. Report No. 43, *ibid*, at 34-36.

Both the federal administrative agency and the states considered the exclusion of out-of-pocket, work-related expenses to be a permissive practice at that time. Tax withholdings, however, were universally regarded as net income for AFDC purposes. The amount of these withholdings was never imputed as available to meet the needs of a family.

The Secretary is mistaken when she characterizes the pre-1962 legislative and administrative history as leaving to administrative discretion the treatment of mandatory payroll deductions. Brief for Petitioner 17. There were, in fact, two steps for determining the attributable income for AFDC households with employed recipients. The first step involved the determination of an AFDC recipient's "take home pay" in strict compliance with the actually available income principle of Section 402(a)(7)(A). This step was not discretionary, and there apparently was no problem with state compliance. *See* Report No. 43, *supra*, at 34-36. The second step involved taking into account work-related expenses, such as the costs of transportation and meals, which recipients paid directly out of funds available to them. Although the federal government viewed the exclusion of these expenses as sound policy, it left this second step to the discretion of the states because it fell outside the requirements of Section 402(a)(7)(A).

The Secretary is still bound today to adhere to this statutory distinction between the treatment of mandatory payroll deductions and other expenses associated with employment. When a department's current interpretation conflicts with its initial contemporaneous position, this Court has found such a change in interpretation wholly unpersuasive. *Watt v. Alaska*, 451 U.S. 259, 273, 101 S. Ct. 1673,

68 L. Ed. 2d 80 (1981); *General Electric Co. v. Gilbert*, 429 U.S. 125, 145, 97 S. Ct. 401, 50 L. Ed. 2d 343 (1976). Conversely, a longstanding, contemporaneous administrative interpretation is afforded special deference by courts. *EEOC v. Associated Dry Goods Corp.*, 449 U.S. 590, 600 n.17, 101 S.Ct. 817, 66 L.Ed. 2d 762 (1981); *Zenith Radio Corporation v. U.S.*, 437 U.S. 433, 450, 98 S. Ct. 2441, 57 L. Ed. 2d 337 (1978). Absent subsequent legislative qualifications or repeal, the Secretary is not free to abandon the interpretation given Section 402(a)(7)(A) by her predecessors.

III

LEGISLATIVE, ADMINISTRATIVE AND JUDICIAL DEVELOPMENTS IN THE 1960's AND 1970's NEITHER MODIFY NOR REPEAL THE APPLICABILITY OF THE ACTUALLY AVAILABLE INCOME PRINCIPLE TO MANDATORY PAYROLL TAXES.

In the 1960's, Congress twice amended the Social Security Act to increase the economic incentives for AFDC recipients to obtain and hold employment. Public Welfare Amendments of 1962, Pub. L. 87-543, § 106(b), 76 Stat. 172, 188 (1962); Social Security Amendments of 1967, Pub. L. 90-248, § 202(b), 81 Stat. 821, 881 (1968). Although both amendments bear on the issues now before this Court, neither altered the treatment accorded mandatory payroll taxes.

Also beginning in the 1960's, this Court reviewed cases involving AFDC provisions for the first time. Several of these cases concerned the applicability of the actually available income principle specified in Section 402(a)(7)(A). *Van Lare v. Hurley*, 421 U.S. 338, 95 S. Ct. 1741, 44 L. Ed. 2d 208 (1975); *Lewis v. Martin*, 397 U.S. 552, 90 S. Ct. 1282, 25 L. Ed. 2d 561 (1970); *King v. Smith*, 392 U.S. 309, 88 S. Ct. 2128, 20 L. Ed. 2d 1118 (1968).

This section analyzes chronologically the relevant legislation, as well as judicial interpretations and administrative regulations, which shaped the eligibility and benefit computations for AFDC households with working recipi-

ents during the 1960's and 1970's. It untangles a confused mixture of assertions and assumptions put forward by the Secretary and demonstrates the soundness of the opinions reached by the lower courts in this case.

A. The Purpose of the 1962 Amendment to the Social Security Act Was to Mandate the Exclusion of Work Expenses Other Than Mandatory Payroll Taxes.

Because most states had not voluntarily considered employment expenses to the extent the federal government regarded as appropriate, the Department of Health, Education and Welfare (HEW) in 1962 requested Congress to add a new clause to Section 402(a)(7). Congress responded by amending this section to require that effective July 1, 1963, states must consider not only the "income" available to a household, but also must deduct "any expenses reasonably attributable to the earning of [that] income" when determining AFDC eligibility and benefit amounts. Pub.L. 87-543, § 106(b), 76 Stat. 172, 188 (1962). This clause established a new mandatory "work expense" deduction.

The Congressional hearings and reports on this amendment underscore Congress' concern that "income" currently attributable to an AFDC family be *additionally* reduced by such expense as transportation costs, uniform costs and costs of meals. *See* S. Rep. No. 87-1589, at 17-18, 1962-1 U.S. Code Cong. and Admin. News 1959-60; *Hearings on Public Assistance Act of 1962 before Senate Committee on Finance (1962 Hearings)*, 87th Cong., 2nd. Sess., at 152 (1962) (Testimony of Health, Education & Welfare Secretary Abraham Ribicoff). There was no mention of mandatory payroll taxes as an employment expense either in public testimony or in the written reports. *See also* Report for the HEW Secretary, *1962 Hearings, ibid*, at 95.

Following the enactment of the 1962 Amendments, HEW amended § 3140 of the *Handbook of Public Assistance Administration* to include a comprehensive list of expenses covered by the new work expense provision. *See Handbook* § 3140 (April 22, 1964) (J. A. 39-41). Conspicuously absent

from this list are mandatory payroll deductions, such as federal and state income tax withholding, social security taxes, or state disability insurance.

In seeking to discount the importance of the legislative and administrative record immediately before and after the adoption of the 1962 Amendments, the Secretary in her brief characterizes this amended *Handbook* provision as a "'master work expense' list buried in a 1962 legislative report." Brief for Petitioner 25-26 and n.17. She thus dismisses as inconsequential Congress' failure to discuss mandatory payroll taxes when it enacted the new work expense provision.

The *Handbook* section is, of course, not an obscure legislative report but a contemporaneous interpretation of the binding requirements of the amended statute by the federal agency which sought its adoption and which was responsible for its implementation. Unless a contemporaneous administrative interpretation is inconsistent with the actual legislation, it is afforded considerable judicial deference. *Zenith Radio Corporation v. U.S.*, 437 U.S. 443, 450, 98 S. Ct. 2241, 57 L. Ed. 2d 337 (1978); *Morton v. Ruiz*, 415 U.S. 199, 237, 94 S.Ct. 1055, 39 L.Ed. 2d 270 (1974); 2A C.D.Sands, *Statutes and Statutory Construction, A Revision of the Third Edition of Sutherland on Statutory Construction* §§ 49.03, 49.08 (4th Ed. 1973).

Furthermore, it is a cardinal rule of statutory construction that reenactment of a particular statutory provision creates a presumption of legislative ratification of its administrative construction. *Fribourg Navigation Co. v. Commissioner of Internal Revenue*, 383 U.S. 272, 283, 86 S.Ct. 862, 15 L. Ed. 2d 751 (1966); *Koshland v. Helvering*, 298 U.S. 441, 445, 56 S. Ct. 767, 80 L. Ed. 1268 (1935); *McCaughn v. Hershey Chocolate Co.*, 283 U.S. 488, 492-493, 51 S. Ct. 410, 75 L. Ed. 1183 (1931).[*] Here Congress re-

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[*] The Court in these cases framed this rule as follows: ". . . the Commissioner's prior long-standing and consistent administrative picture must be deemed to have received Congressional approval."

enacted the "income and resources" provision of Section 402(a)(7) at the same time it established the new disregard for work expenses.[8]

This re-enactment together with the total absence in the 1962 legislative record of any reference to mandatory payroll taxes as being covered by the new work expense clause is strongly persuasive evidence that Congress understood and recognized that HEW's construction of the "income and resources" clause already required the states to take into account the take home pay, not the gross earnings of working recipients. The failure to mention mandatory payroll taxes was not the result of an oversight but because the disregard of such tax withholdings was not the subject of congressional action at that time.

The purpose of the 1962 amendment to Section 402(a)(7) was to require, rather than leave optional, the second step in the AFDC eligibility and benefit calculation so as to insure that work expenses other than mandatory payroll deductions also would be taken into account. The then-existing policy and practice of using take home pay to de-

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Fribourg v. *Commissioners*, *supra*, 383 U.S. at 283. "We give great weight to an administrative interpretation long and consistently followed, particularly when the Congress, presumably with that construction in mind, has re-enacted the statute without change." *Koshland* v. *Helvering*, *supra*, 298 U.S. at 445. "The re-enactment of the statute by Congress, as well as the failure to amend it in the face of the consistent administrative construction, is at least persuasive of the legislative recognition and approval of the statute as constructed." *McCaughn* v. *Hershey Chocolate*, *supra*, 283 U.S. at 492-493.

[8] The Public Welfare Amendments of 1962, Pub. L. 87-543, § 106 (b), 76 Stat. 172, 188 (1962) stated in pertinent part the following:

> (b) Section 402(a)(7) of such Act is amended to read as follows: "(7) provide that the State agency shall, in determining need, take into consideration any other income and resources of any child or relative claiming aid to families with dependent children, as well as any expenses reasonably attributable to the earning of any such income; . . .

1962-1 U.S. Code Cong. & Admin. News 235.

termine actually available income meant that there was no need for an amendment to compel the states to disregard tax withholdings. The Ninth Circuit summarized the 1962 legislative and administrative record as follows:

> The total absence of reference to mandatorily withheld taxes in the legislative history of the 1962 agency-initiated congressional amendment and in the subsequent agency publications . . . indicate that . . . the two items [withheld taxes and work expenses] continued to be seen as conceptually different.

Turner v. *Prod*, *supra*, 707 F.2d at 1120 (Supp. App. 27a-28a). For the 87th Congress, the legislative authority to disregard mandatory payroll taxes, on the one hand, and out-of-pocket work expenses, on the other, lay in different clauses of Section 402(a)(7). Together these provisions operated to insure that working recipients were not worse off financially than non-working recipients in meeting the basic support needs of their families.

B. The Social Security Amendments of 1967 Established a New "Work Incentive" as an Additional, not an Alternative, Disregard to the Exclusions from Income Required by Section 402(a)(7).

Although the 1967 Amendments to the Social Security Act, Pub. L. 90-248, § 202(b), 81 Stat. 821, 881 (1968), did not themselves change the meaning of the term "income" as used in Section 402(a)(7)(A), they are relevant here because they set a fundamental structural relationship between Section 402(a)(7) and Section 402(a)(8), and because they led to the adoption of an "earned income" definition by HEW, which the Secretary now misuses as a key factor in support of her argument.

The 90th Congress amended Section 402(a)(7) and added a new Section 402(a)(8). Together they read, in pertinent part, as follows:

> "(7) *except as may be otherwise provided in clause (8)*, provide that the State agency shall, in determining need, take into consideration any other income and re-

sources of any child or relative claiming aid to families with dependent children, or of any other individual (living in the same home as such child and relative) whose needs the State determines should be considered in determining the need of the child or relative claiming such aid, as well as any expenses reasonably attributable to the earning of any such income;

(8) *provide that, in making the determination under clause (7)*, the State agency—

"(A) shall with respect to any month disregard . . .

"(ii) in the case of earned income of a dependent child not included under clause (i), a relative receiving such aid, and any other individual (living in the same home as such relative and child) whose needs are taken into account in making such determination, the first $30 of the total of such earned income for such month plus one-third of the remainder of such income for such month . . . (emphasis added).

Pub. L. 90-248, § 202(b), 81 Stat. 821, 881 (1968), 1967-1 U.S. Code Cong. & Admin. News 998.

The italicized prefatory language in each section above sets forth a reciprocal cross-reference to the other section. The purpose of these cross-references was to establish a relationship between the disregards from income newly enacted as part of Section 402(a)(8), and the exclusions already specified in Section 402(a)(7). The Secretary in her brief reads these cross-references, which have not changed significantly in their language since their original enactment,[5] as creating a limitation in Section 402(8)(a) on the treatment of excludable income as generally required by Section 402(a)(7). Brief for Petitioner 13-14. According to the Secretary, the language in Section 402(a)(7) which

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[5] The only pertinent changes are that the current versions of the reciprocal references now refer to "paragraph (8)" and "paragraph (7)" rather than "clause (8)" and "clause (7)". *See* 42 U.S.C. §§ 602(a)(7) and 602(a)(8) (Supp. V 1981).

states "except as may be otherwise provided" in Section 402(a)(8) means that disregards required by Section 402(a)(8) are *instead of* those specified in Section 402(a)(7). This reading is simply wrong.

The disregards provided by Section 402(a)(8) in 1967 were enacted as *additional* deductions from AFDC household income, not as a substitution for or a limitation on the disregards from income directly required by Section 402(a)(7). The cross-reference language was meant to leave no doubt that in implementing the AFDC program the states were to treat as non-countable income certain amounts that might otherwise be considered actually available. In other words, the general rule set out in Section 402(a)(7) to "take into consideration any other income and resources" was not to override the specific rules contained in Section 402(a)(8), all of which involved additional not alternative exclusions to those then required by Section 402(a)(7).

For working recipients, this meant that after the determination of take home pay and excludable work expenses under Section 402(a)(7), the states were to provide a new "work incentive" disregard as a third step before determining countable income in the AFDC benefit calculation.

The computation of this third step is what led HEW to adopt an "earned income" definition as part of the first codified set of regulations covering the AFDC program. *See* 34 Fed.Reg. 1394 (1969). This definition, which has not changed since its initial adoption,[6] states that "earned income" is "the total amount, irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the costs of tools, materials, special uniforms, or transportation to call on customers." 45 C.F.R. 233.20(a)(6)(iv) (1983). The original purpose of the earned income definition was to require the states to compute liberally the "work incentive" de-

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[6] Cf. 34 Fed.Reg. at 1396 with 47 Fed.Reg. 3648, 3670 (1982).

duction under Section 402(a)(8). It had nothing to do with the treatment of income directly pursuant to Section 402(a)(7).

The 1967 "work incentive" deduction required that a sum equal to $30, plus 1/3 of the balance of earnings after subtracting the first $30, be disregarded from a recipient's gross monthly earnings. The definition of "earned income" was part of the regulatory scheme directing states to determine the 1/3 portion based on gross earnings minus $30, not net income from earnings after subtracting both the first $30 and amounts for mandatory payroll deductions and out-of-pocket expenses. *See* Preamble and 45 C.F.R. §§ 233.20(a)(6)(iv), (7) and (11)(ii)(b) in 34 Fed.Reg. 1394-1396 (1969). This calculation provided for a greater $30 and 1/3 earned income disregard than at first proposed (thereby permitting larger grants to recipients) and was consistent with Congress' objective at the time to encourage welfare recipient employment through financial incentives.

Several states, however, disputed this method for calculating the "work incentive" disregard and argued instead for a computation of the 1/3 set aside based on an amount computed after all other deductions. The courts at the time rejected this contention and upheld HEW's regulatory scheme under Section 402(a)(8) in its entirety. *See Arizona State Department of Public Welfare v. Dep't. of Health, Education and Welfare (HEW)*, 449 F.2d 456, 469-471 (9th Cir. 1971), *cert. den.* 405 U.S. 919, 92 S. Ct. 945, 30 L. Ed. 2d 789 (1972); *Connecticut State Department of Public Welfare v. HEW*, 448 F.2d 209, 214 (2nd Cir. 1971).

In its opinion below, the Ninth Circuit reaffirmed its earlier view in *Arizona v. HEW*, *supra*, 449 F. 2d at 470 n. 21, that the "earned income" definition applied only to computations made under Section 402(a)(8) and that the term had a different meaning from the term "income" used in other AFDC provisions. *Turner v. Prod*, *supra*, 707 F.2d at 1117 n. 10 (Supp. App. 19a-20a n. 10). The court

emphasized that the term "earned income" in Section 402(a)(8) was not a substitute for the term "income" in Section 402(a)(7)(A), whenever AFDC recipients have income from employment. It stated,

> . . . prior to the enactment of OBRA in 1981, § 602(a)(8) dealt *only* with the old work incentive disregards which required additional deductions from household income and did not deal in any way with disregards of work expenses or offsets for mandatory tax withholding. In other words, before 1981 § 602(a)(8) did not act in any way whatever as a substitution for or limitation on § 602(a)(7). (Emphasis in the original).

Turner v. Prod, *supra*, 707 F.2d at 1116 (Supp. App. 18a). The court below found nothing inconsistent in either the *Arizona* case or this case in having different provisions of the Social Security Act use similar terms but with different definitions in accordance with the respective purpose of each provision.

As in 1969, the "earned income" definition does not now have any bearing on the issue before this Court regarding the use of take home pay to compute actually available income as required by Section 402(a)(7)(A). Its present relevance to the AFDC program has to do only with the computation of the disregards specified in Section 402(a)(8)(A), in particular the reversal by OBRA of the method for calculating the $30 and 1/3 deduction so that it would be made after other Section 402(a)(8)(A) deductions. Pub. L. 97-35, § 2301, 95 Stat. 357, 843 (1981), 42 U.S.C. § 602(a)(8)(A)(iv)(Supp. V 1981).

Under the current provisions of Section 402(a)(8)(A), this definition remains an integral part of the implementation of the "work incentive" disregard since it directs that the 1/3 computation be made from gross earnings after subtracting the $75 work expense disregard, any dependent care expenses up to $160 per child each month, and the first $30. Exclusions for mandatory payroll deductions are irrelevant for this purpose just as they were before

OBRA.* The technical and specific meaning of the term "earned income" has a limited purpose within the AFDC program and is not a substitute for the term "income" used in Section 402(a)(7)(A).

C. This Court Has Consistently Required Strict Compliance with the Actually Available Principle.

Two of the earliest cases involving AFDC issues brought to this Court concerned the "actually available" principle of Section 402(a)(7)(A). In each case, this Court looked to the original authorizing legislation as well as applicable federal regulations and required states to include only income or resources that are actually available to the AFDC household.

In *Lewis v. Martin*, *supra*, 397 U.S. 552, plaintiffs challenged a California law pertaining to AFDC benefits that conclusively presumed that the needs of dependent children were reduced by the amount of income earned by an unrelated man in the household, whether that income was *in fact* available or actually used to meet the needs of the dependent children. This Court struck down the California law and held that only income actually received was appropriate for the calculation of income levels. The Court stressed that § 402(a)(7) had been properly construed by HEW's "actually available" regulation, which the Court quoted as follows:

> [*O*]*nly income and resources that are, in fact, available to an applicant or recipient for current use on a regular basis* will be taken into consideration in determining need and the amount of payment. (Emphasis added).

Ibid at 555 (footnote omitted). This regulation, which the Court described as clearly comporting with the Act, tracked the language of earlier federal guidelines dating back to

*For another discussion of this point, see Amicus Curiae Brief of the State of New York in support of AFDC Respondents submitted contemporaneously with this Brief.

the Social Security Board's policy statements in the early 1940's. *See* discussion, *supra*, at 12-13.

The Court had previously discussed the concept of actually available income in *King v. Smith*, *supra*, 392 U.S. 309, 319 n.16. There, the Court invalidated an Alabama "substitute father" regulation that denied AFDC benefits to the children of a mother who cohabited with any single or married man. The Court noted that HEW guidelines restricted recognition of income to that actually available to the applicant as required by the Social Security Act.

This Court reaffirmed the *King* and *Lewis* position in *Van Lare v. Hurley*, *supra*, 421 U.S. 338, when it struck down a state statute that denied benefits to dependent children because of the income of a lodger, without regard to whether the lodger actually contributed to the children's support. It has never issued a contrary decision.

Other courts, in various contexts, have consistently followed the Court's determination that AFDC grant calculations must be based on funds actually available to a recipient household. For example, in *National Welfare Rights Organization v. Mathews*, 533 F.2d 637 (D.D.C. 1976), the court invalidated a federal regulation that valued recipients' real and personal property resources without regard to encumbrances. In that case, the court applied the principle of actual availability and held that any encumbrances on the recipient's property must be considered in determining eligibility. In declaring the regulation therein invalid, the court stated:

> Valuing resources without regard to encumbrances violates *the cardinal principle of AFDC that only resources actually available* may be counted in determining whether the recipient is within the state's definition of a standard of need. (Emphasis added).

Ibid, at 649. *See also Green v. Barnes*, 485 F.2d 242 (10th Cir. 1973) (involving the same issue); *Reyna v. Powell*, 470 F.2d 494, 496-97 (5th Cir. 1972), (holding that Texas could consider as income "only the amount of actual con-

tributions" made by 18-21 year-old children who were not themselves recipients). The instant case poses the same legal question in the factual context of the earnings of a family member receiving AFDC aid.

The Secretary seeks to distinguish this clear line of authority by claiming that the concept of actually available income has never before been applied to the earnings of AFDC recipients. Brief for Petitioner 29-30. This claim is inaccurate and misleading. First, as discussed, *supra*, at 14-16, federal administrative policy since 1939 had been to take into consideration only the take home pay of working recipients. Second, while the courts had not previously applied the "actually available" concept to the earnings of AFDC recipients, they had not rejected this approach. The issue simply did not arise prior to 1981 because the pre-OBRA method for calculating AFDC grants routinely excluded from recipient earnings amounts equal to all mandatory payroll deductions.

The Secretary's principal support for her position is derived from several internal memoranda on employment expenses prepared by HEW staff in the 1970's.[20] Brief for Petitioner 19-21. Both the district court and court of appeal below found that these documents did not address the statutory requirements of Section 402(a)(7).

The district court regarded the grouping together for reporting purposes of mandatory payroll taxes and work expenses in the post-1962 period as "simple administrative convenience" and not statutorily significant. The district court concluded that "mandatory payroll deductions were not going to be counted as 'income' for purposes of

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[20]The material reported in these documents largely came from federal records regarding state practices. The drafter of one of the internal memorandum therefore qualified the information reported as follows: "An additional comment must be that it is literally impossible to know, from manual material available in Central Office, what states are actually doing with regard to expenses of employment." HEW Memorandum (February 1, 1972) (J.A. 67).

decreasing benefits" whether considered separately or with other employment expenses. *Turner v. Woods*, *supra*, 559 F.Supp. at 612 (Pet. App. 40a-41a).

The district court then pointed out that prior to this Court's decision in *Shea v. Vialpando*, 416 U.S. 251, 94 S.Ct. 1746, 40 L. Ed. 2d 120 (1974), which required the states to allow individual consideration for all work expenses, HEW memoranda indicate that virtually every state computed mandatory payroll deductions "on an *individualized basis* flatly inconsistent with the treatment then accorded to work expenses . . ." *Turner v. Woods*, *supra*, 559 F. Supp. at 612 (Pet. App. 41a) (Emphasis in the original). The chief inference drawn by the district court from the HEW documents was that states did treat mandatory payroll deductions and out-of-pocket expenses differently prior to 1974.

The court of appeal concurred in the district court's characterization of the administrative record. *Turner v. Frod*, *supra*, 707 F.2d at 1120 (Supp. App. 27a-28a). The appellate court noted that in the post-*Shea* era there appeared to have been a blurring in distinction between mandatory payroll taxes and work expenses at the administrative level. The court of appeal then distinguished between practical administration and authorizing legislation:

> It goes without saying that a change in the way in which an agency administers a statute does not change the intent with which Congress enacted it.

Ibid, at 1121 (Supp. App. 28a). While the HEW memoranda discuss the full range of employment-related expenses, their purpose was chiefly to report on state practices, not to analyze the statutory origin of the different deductions."

The Secretary's use of the *Shea* decision is also inappocite. While *Shea* is an important decision with respect to

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[21]Most of the HEW memoranda appear to have been developed in response to the *Shea* litigation both prior to this Court's decision and as part of the follow-up monitoring of state compliance.

the proper determination of the "work expense" disregard established by the 1962 legislation, it does not address the computation of actually available income required by Section 402(a)(7)(A). The facts in *Skeo* concerned Colorado's failure to consider individually recipient transportation, clothing and other miscellaneous work expenses. Colorado already required the individual deduction of mandatory payroll taxes, and, therefore, their treatment was not affected by the Court's decision. The *Skeo* Court unanimously held that the 1962 amendment to the Social Security Act required individualized consideration of out-of-pocket work expenses rather than a totally standardized deduction. It was this holding that was overruled legislatively by the enactment of the flat $75 work expense disregard in OBRA.

The *Skeo* Court did not analyze or even consider the statutory basis for excluding mandatory payroll deductions. It made only passing reference to such deductions in describing the Colorado AFDC plan as requiring "individualized treatment of mandatory payroll deductions and child care costs," but permitting standardized treatment of "all other work-related expenses." *Skeo v. Violpando*, *supra*, 416 U.S. at 255. Both courts below regarded this single grammatically ambiguous reference to a term of art not at issue in the case as a dubious basis for finding that this Court had radically re-interpreted or modified the "income and resources" clause of Section 402(a)(7). *Turner v. Prod*, *supra*, 707 F.2d at 1119 n.11 (Supp. App. 22a-23a n.11); *Turner v. Woods*, *supra*, 559 F. Supp. at 612-613 n.6 (Pet. App. 61a-62a n.6).[*] In sum, the issue now before this Court was simply not under consideration in *Skeo*.

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[*] In similar situations this Court has stated, "[I]t is a canon, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used." *Lovick Radio Corporation*, *supra*, 457 U.S. at 602, quoting *Cohens v. Virginia*, 6 Wheat 264, 399, 5 L. Ed. 257 (1821).

The issue here is the continuing applicability of the actually available income principle to the treatment of mandatory payroll taxes. The formal agency regulation which now embodies this principle was not changed significantly after OBRA. It reads as follows:

> **Net income . . . and resources available for current use shall be considered; income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance.**

45 C.F.R. § 233.20(a)(3)(ii)(D)(1983). This language is similar to that referred to by this Court in *Lewis v. Martin*, *supra*, 397 U.S. at 555, and utilized by federal administrative agencies since the 1939 amendment to the Social Security Act. It is therefore not surprising that in materials prepared on the OBRA amendments, the Department of Health and Human Services itself confirmed that "the income definitions not specifically addressed by the Reconciliation Act remain unchanged." Linda S. McMahon, Questions and Answers on the Social Welfare Amendments of 1981 (September 11, 1981) (J. A. 77).

It would appear that the real source of the differences between the parties lies in HHS's faulty institutional memory regarding the scope of the actually available income principle. The Ninth Circuit characterized the OBRA situation as follows:

> **The change in agency practice [to include mandatory payroll taxes within the $75 work expense disregard] seems established. Whether Congress had adequate notice of that change is unclear. What is clear is that Congress had no notice of the fact that the change would create a conflict with the longstanding and familiar interpretations of § 602(a)(7).**

***Turner v. Prod*, *supra*, 707 F. 2d at 1121 (Supp. App. 28a).**

The next section of this brief discusses the OBRA amendments and their impact upon the AFDC program.

IV

THE OBRA AMENDMENTS DO NOT AMEND THE ACTUALLY AVAILABLE INCOME PRINCIPLE AS IT APPLIES TO MANDATORY PAYROLL TAX WITHHOLDINGS.

The Omnibus Budget Reconciliation Act of 1981, Pub. L. 97-35, 95 Stat. 357 (1981), involved a number of important changes in the AFDC program, only one of which is at issue in this case. This provision concerns Congress' enactment of a $75 work expense disregard for full time workers and a lesser amount at the discretion of the states for part time workers. Pub. L. 97-35, § 2301, 95 Stat. 357, 843, 42 U.S.C. § 602(a)(8)(A)(ii) (Supp. V 1981). Both courts below held that this provision did not involve a change in the statutory basis for excluding mandatory payroll taxes as required by the "income and resources" clause of Section 402(a)(7)(A), 42 U.S.C. § 602(a)(7)(A) (Supp. V 1981).

As previously shown, prior to OBRA, the AFDC benefit calculation for working recipients involved three analytically distinct steps. The first step required the states to determine a recipient household's "actually available" income. In the case of recipients with earnings, this step historically required the use of "take home pay" to determine the disposable income available to a family to meet its current support needs. The second step involved a "work expense" disregard established in 1962 to insure that working recipients were not worse off because of additional out-of-pocket work expenses. This step was the subject of the Court's decision in *Shea v. Vialpando*, *supra*, 416 U.S. 251. The third step involved the determination of a $30 and 1/3 "work incentive" disregard enacted in 1967 to provide a financial incentive for AFDC recipients to seek and retain employment.

The Secretary ignores or minimizes the differences in statutory origin of the first and second steps in the AFDC calculation, even though the legislative and administrative record in 1962 clearly indicates that the work expense disregard was neither needed nor intended to cover mandatory payroll taxes. *See* discussion, *supra* at 18-21. The Secretary's position, which is supported by the state respondents, is that OBRA's deletion of the clause "any expenses reasonably attributable to the earning of any such income" from Section 402(a)(7) and the Act's addition to Section 402(a)(8) of specific work expense disregards" amend as well the statutory basis for excluding mandatory payroll taxes. In other words, despite the fact that no previous Congress had taken such action, the Secretary maintains that OBRA not only legislatively standardized the expenses previously covered by the 1962 amendment to the Social Security Act but also repealed a forty-year policy regarding the use of take home pay in accordance with the "income and resources" clause of Section 402(a)(7)(A).

A. The Secretary's Interpretation of the OBRA "Work Expense" Disregard Renders Meaningless Congress' Stated Concerns for its Enactment.

The Secretary views the budget-cutting objectives of the OBRA amendments as over-riding all other considerations when interpreting the impact of OBRA on the AFDC program. She therefore not only avoids a careful analysis of the history of the Social Security Act but also exaggerates the actual changes enacted by Congress as part of OBRA. As the courts below make clear in their opinions, the dispute here does *not* involve the general intent underlying OBRA but rather the impact of the OBRA amendments on the longstanding meaning of Section 402(a)(7)(A).

Congress has established exceptions to the principle of actual availability, which limit the effect of the "income and resources" clause. For example, Congress explicitly

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[11] In addition to the miscellaneous work expense deductions for full time and part time workers, OBRA also established a related provision (*not at issue here*) which capped dependent care expenses at $160 per child each month. Pub. L. 97-35, § 2301, 95 Stat. 357, 843, 42 U.S.C. § 602(a)(8)(A)(iii) (Supp. V 1981).

established as part of OBRA three limited exceptions (not in dispute here) to this principle." Congress in 1981, however, did not indicate an intention to create a similar exception for mandatory payroll taxes.

As in 1962, when Congress first enacted a work expense deduction, the legislative history of the OBRA amendments contains no mention of mandatory payroll taxes as a consideration underlying the action taken either in the Act's text or in accompanying legislative reports. Nonetheless, the Secretary argues that payroll tax withholdings are included within the $75 standardized deduction, a position which leaves Congress' stated reasons for the establishment of a standard allowance devoid of meaning and effect.

Congressional concerns regarding work expenses were succinctly set forth by the Committee on the Budget:

> The committee believes that the current earned income disregard provisions have resulted in serious problems. Because Federal law neither defines nor limits what may be considered a work-related expense, there is now great variation among the States and many instances of abuse. In addition, the requirement for itemization of individual work expenses has resulted in administrative complexity and error. It is the committee's belief that a change in the law with respect to work expenses would have the effect of limiting abuse of the work expenses disregard and also result in simpler and more accurate determination of benefits.

"OBRA at Section 2305 amended § 402(d)(1) of the Social Security Act to permit the inclusion of an amount equal to the earned income credit provided by § 3507(a) of the Internal Revenue Code; Section 2306 altered the treatment of stepparent income by adding a new paragraph (31) to § 402(a); and Section 2320 added a new § 415 which draws a portion of the income and resources of an alien's sponsor available to an alien recipient. 42 U.S.C. § 602(d)(1), 602(a)(31) & 615 (Supp. V 1981).

S. Rep. 97-139, 97th Cong., 1st Sess. at 501-02, 1981-2 U.S. Code Cong. & Adm. News 768. This statement indicates three major reasons for adopting the work expense provisions of Section 402(a)(8)(A).

First, Congress wanted to counter great variation among states concerning the treatment of work expenses. While state practices varied greatly with respect to credit given out-of-pocket work expenses, virtually all states individually excluded payroll tax withholdings when determining AFDC eligibility and benefit levels. *See* discussion, *supra*, at 28-29. There was no meaningful variation in state practices regarding payroll taxes.

Second, Congress wanted to reduce administrative complexity and possibilities for error. Mandatory payroll taxes are set out on a recipient's payroll stub, which all working recipients are required to submit monthly to their county welfare department. *See e.g.* California Department of Social Services EAS § 40-181.2. Since these deductions are specifically enumerated on payroll stubs, they are not difficult for AFDC case workers to determine.

Third, Congress wanted to limit abuse in the claiming of work expenses. Because payroll stubs specifically itemize mandatory payroll deductions, it is virtually impossible for recipients to falsify claims.

Both courts below therefore characterized mandatory payroll deductions as "paradigmatic examples of items not subject to applicant falsification and not at all difficult for administering states to calculate." *Turner v. Prod*, *supra*, 707 F. 2d at 1124 (Supp. App. 26a), quoting *Turner v. Woods*, *supra*, 559 F. Supp at 613 (Pet. App. 43a) (emphasis in original). None of the stated congressional purposes for amending Section 402(a)(8) are served by including mandatory payroll taxes within the $75 work expense disregard.

Despite the absence of any apparent Congressional reason or specific authorization for subsuming tax withholdings within the $75 work expenses disregard, the Secre-

tary chooses to apply this provision in a loose and sweeping fashion. Ironically, the effect of her interpretation is to *eliminate*, not standardize, the treatment of work expenses because in almost all cases the entire amount of the disregard would be consumed by payroll tax withholdings with nothing left for expenses such as transportation, uniforms or meals, the very expenses intended to be covered by this new provision.

California statistical reports indicate that prior to OBRA, the California statewide average amount claimed for mandatory payroll deductions by families with either a full time or part time working parent receiving AFDC was $83. *See* California Department of Social Services, AFDC Social and Economic Characteristics for Families Received Aid during July 1980, Program Series Information Report 1982-01, Table 18 (January 1982) (J. A. 92). At the time of OBRA's implementation, a mother with one child, who worked at the minimum wage ($3.35/hour), 40 hours a week, 4.3 weeks per month, would have had $57.92 withheld each month for federal and state income taxes, social security taxes and State Disability Insurance, while a mother with two children who worked the same amount of time at the same rate would have had $73.72 withheld. In short, in both the average and the most typical AFDC family situations, the limit of $75 as a standard amount to cover both mandatory payroll taxes and out-of-pocket work expenses would operate to deny employed recipients an allowance for anything but payroll withholdings.

Nothing in the text or stated legislative reasons for the standardization of a miscellaneous work expense allowance supports the construction of this provision as covering mandatory payroll taxes. Consequently, the Secretary is left with an argument which requires this Court to find that in 1981, Congress had repealed by implication the use of take home pay as the amount to be used when determining a family's actually available income under

Section 402(a)(7)(A). *Turner v. Fred*, *supra*, 707 F.2d at 1121, 1124 (Supp. App. 28a, 36a). Repeal by implication is strongly disfavored when interpreting legislative provisions. *TVA v. Hill*, 437 U.S. 153, 189, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978); *Morton v. Mancari*, 417 U.S. 535, 549, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *Posadas v. National City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936). The rule is that "the intention of the legislature to repeal must be clear and manifest." *Posadas*, *ibid.* The record in this case is anything but "clear and manifest."

B. In Enacting the $75 Work Expense Disregard, the 97th Congress Did Not Repeal by Implication the Actually Available Income Provision as It Applies to Payroll Tax Withholdings.

The Secretary's main support for her interpretation of the $75 work expense is that the 97th Congress would not otherwise be able to achieve the projected savings attributed to OBRA. Affidavit of Linda S. McMahon, HHS Associate Commissioner for Family Assistance (August 1982) (J.A. 80-81).[17] In support of this contention, the Secretary points to the fiscal estimates prepared by the Congressional Budget Office (CBO) and contained in S. Rep. 97-139, 97th Congress, 1st Sess., at 447, 1981-2 U. S. Code Cong. and Admin. News 713. These estimates include within one figure not only projected savings attributable to the $75 work expense disregard, but also projected

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[17] This affidavit was prepared during litigation of this case after the district court's initial ruling. It is a post-OBRA statement of an administrative official whose actions were being legally challenged. Since it is not a statement of intent by a member of Congress or even an administrative official at the time of OBRA's enactment, it is of dubious evidentiary value. Moreover, Ms. McMahon's statement flatly contradicts the memorandum she issued at the time of OBRA's initial implementation (*see* J.A. 77), where she indicated that OBRA amendments did not change the meaning of "income" as used in Section 402(a)(7)(A). *See* discussion, *supra*, at 31.

savings due to the dependent care expense cap[16] and the computation of the 1/3 work incentive disregard after other Section 402(a)(8)(A) deductions.[17] *McMahon Affidavit*, *supra* (J. A. 81); S. Rep. 97-139, *supra*, 1981-2 U.S. Code Cong. & Admin. News 713.

The Secretary's reasoning is specious. These broad projections of cost savings are not useful in determining congressional intent because the legislative record does not link the assumptions behind the bare statistical data to the enactments themselves. Such estimates are simply not part of the policy record evidencing the intent behind specific congressional amendments.[18] First, the assumptions underlying such estimates constantly change because of ups and downs in the economy, changing state policies and practices, and other similar factors.[19] Second, the

[16] 42 U.S.C. § 602(a)(8)(A)(iii) (Supp. V 1981).

[17] 42 U.S.C. § 602(a)(8)(A)(iv) (Supp. V 1981).

[18] Courts generally refuse to find that funding decisions for a specific program contained in an appropriations act evidence an intent by Congress to repeal or limit the applicability of a previously enacted substantive provision. *TVA v. Hill*, *supra*, 437 U.S. at 189-190; *Rincon Band of Mission Indians v. Harris*, 618 F. 2d 569, 573 (9th Cir. 1980). The burden is on the government in these cases to demonstrate "congressional knowledge of the precise course of action" which supports the claim of repeal. *Rincon*, *ibid.* The use of projected savings estimates in a budget reconciliation act is equally of little weight in trying to elucidate congressional intent.

[19] The American Public Welfare Association (APWA) did a state survey immediately after the initial implementation of OBRA and came up with strikingly different savings estimates than those put forward by the CBO or HHS. See APWA, Survey of States Shows FY 1982 Welfare Savings Less than Half Administrative Estimates (February 8, 1982) (AFDC Respondents App. A). Note that the category "earned income disregards" in this document includes also projected savings due to the four month limitation on the work incentive disregard enacted as part of OBRA, Pub. L. 97-35, § 2301, 95 Stat. 357, 844, 42 U.S.C. § 602(a)(8)(B)(ii)(II)(Supp. V 1981), which was listed as a separate line item in the CBO estimates. Cf. S. Rep. 97-139, *supra*, at 447, 1981-2 U.S. Code Cong. and Admin. News 713.

relationship between budget estimates and legislative changes is tenuous because of drafting changes that may take place or differing legal interpretations of various statutory provisions. Finally, as in this case, there is no way to determine reliably the cost savings attributable to different statutory provisions which will interact in the administration of the program.

Several studies have been conducted since the enactment of OBRA in an effort to identify its impact upon the AFDC program.[20] None of these studies has been able to determine the independent effect of the $75 work expense disregard on fiscal savings. *See e.g.* GAO, An Evaluation of the 1981 AFDC Changes, *supra*, at 20-21. Overall, however, there appear to be less savings attributable to the earned income disregards than the federal government projected prior to OBRA's enactment. APWA, Survey of States, *supra* (Res. App. A-6). The single OBRA change most responsible for cost savings has been the limitation on AFDC eligibility when a household's income exceeds 150% of a state's standard of need. Pub. L. 97-35, § 2303, 95 Stat. 357, 845, 42 U.S.C. § 602(a)(18)(Supp. V 1981). This provision, which is not at issue here, was originally projected to have only a negligible impact on AFDC program costs. APWA, Survey of States, *supra* (Res. App. A-6).

[20] *E.g.* General Accounting Office (GAO), PEMD-84-6, An Evaluation of the 1981 AFDC Changes: Initial Analysis (April 2, 1984); William A. Weder, Division of Research, Evaluation and Statistics, OPE, OFA, SSA, HHS, Current AFDC Recipient Characteristics and Analysis of Selected Caseload Changes Between May 1981 and May 1982 (undated, circa 1982 or 1983); Research Triangle Institute, Final Report: Evaluation of the 1981 AFDC Amendments, submitted to OFA, SSA, HHS under Contract Number 600-82-0056 (April 15, 1983); Center for the Study of Social Policy, Working Female-Headed Families in Poverty: Three Studies of Low-Income Families Affected by the AFDC Policy Changes of 1981 (March 1984) and The Impact of Federal Budget Cuts on AFDC Recipients: A Compendium of Studies (January 1983); APWA, Survey of States, *supra*.

Estimated fiscal savings, the underlying assumptions of which Congress is rarely aware, are poor evidence of legislative intent even in the clearest of circumstances. They are of no value in the circumstances of this case, where savings from the provision in question were not and cannot be isolated from the inter-related effects of a number of other key provisions.

In *Zuber v. Allen*, 396 U.S. 168, 192, 193, 90 S. Ct. 314, 24 L. Ed. 2d 345 (1969), this Court stated that the intent underlying a provision had to be communicated to Congress and be supported by evidence that Congress acted with that precise understanding in mind. The *Zuber* Court had rejected the government's construction of a milk pricing statute, in large part because it had found totally unpersuasive the government's reliance on congressional awareness of certain computations set forth in an appendix to a government report. *Ibid*, at 194. Here the Secretary relies on questionable projections about cost savings, not specifically attributable to the §75 work expense disregard, in a legislative context where, as will be shown next, Congress had no reliable information regarding the agency's proposed construction of the provision.

The Secretary's second line of support for her interpretation of legislative intent in 1981 is drawn from the voluminous hearing record of the various AFDC provisions which eventually became part of OBRA. *Brief for Petitioner* 42-44 n.33. The testimony during these hearings was directed at the consequences of the proposed AFDC changes as a whole, particularly for working recipients. No one disputes that OBRA established financial disincentives for employment. The issue in this case, however, is not the overall impact of OBRA but the specific statutory basis for excluding mandatory payroll taxes from consideration. On this question, the congressional hearings are not illuminating. The only comments even remotely relevant were cursory listings of payroll deductions along with examples of out-of-pocket work expenses by two non-government witnesses as part of a general attack on the disincentives and unfairness of the proposed working recipient policies.[*] The Ninth Circuit correctly treated this testimony as "weak evidence" of legislative intent. *Turner v. Prod*, *supra*, 707 F. 2d at 1119 (Supp. App. 24a).

One commentator has noted, "Legislative hearings may produce detailed comments on pending bills, but typically these come from partisans of one interest or another and must be discounted accordingly." J. Hurst, *Dealing with Statutes* 43 (1982). *See also McCoughs v. Hershey Chocolate Co.*, *supra*, 284 U.S. at 494; 2A C. D. Sands, *Statutes and Statutory Construction, A Revision of the Third Edition of Sutherland on Statutory Construction* § 48.10 (4th ed. 1977).

The Ninth Circuit's cautious approach to repeals by implication closely parallels this Court's own views. For example, in *TVA v. Hill*, *supra*, 347 U.S. at 191, the Court refused to find an exception to the rule against an implied repeal and upheld environmental legislation protecting endangered species, even in the face of subsequent congressional appropriations supporting the construction of a dam that would have destroyed the habitat of the lowly snail darter.

Nothing in the 1981 legislative record here suggests that Congress intended to repeal a longstanding interpretation of the "income and resources" clause when it amended the latter part of Section 402(a)(7) and added a new "work expense" disregard to Section 402(a)(8). The record is ab-

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[*] *See* testimony of Christine Pratt-Marston for the National Anti-Hunger Coalition; *Administration's Proposed Savings in Unemployment Compensation, Public Assistance, and Social Services Programs: Hearings Before the Subcommittee on Public Assistance and Unemployment Compensation of the Committee on Ways and Means, House of Representatives*, 97th Cong., 1st Sess. 88-89 (1981); Testimony of Marian Wright Edelman, President, Children's Defense Fund, *Spending Reduction Proposals, Hearings Before the Committee on Finance*, United States Senate, Part 1, 97th Cong. 1st Sess. 277 (1981).

solutely devoid of the type of "clear and manifest" intention necessary to support an implied repeal of a forty-year-old policy.

C. Unless There Has Been A Clear and Manifest Intent to Repeal, Later Acts of Congress Have to be Reconciled with the Provisions and Purposes of Earlier Acts.

The policy preferences regarding working AFDC recipients enacted by the 97th Congress clearly were different from those of earlier Congresses. However, this difference does not mean that Congress thereby overruled all previous provisions affecting working recipients. Even after OBRA, the historic interpretation of the "income and resources" clause, which required states to take into account only the take home pay of working recipients, remained intact. The courts below therefore looked at the requirements of Section 402(a)(7)(A) and 402(a)(8)(A)(iii) and read them in a manner which accommodated the text and purposes of each.

Rather than ignoring four decades of legislative and administrative history, the courts below sought to reconcile the competing AFDC policy objectives of different sessions of Congress. This Court's preferred approach in comparable situations is similarly one of accommodating whenever possible earlier and later statutory provisions. *See e.g., Morton v. Mancari, supra*, 417 U.S. 535, where the Court found no conflict between civil rights provisions prohibiting employment discrimination and the traditional legislative preference afforded Indians for positions within the Bureau of Indian Affairs.

The contrary analysis favored by the Secretary by-passes this effort at legislative accommodation. Not surprisingly, therefore, her interpretation of the Social Security Act leads to a number of irrational consequences within the AFDC program.

First, as previously explained (*see* discussion, *supra*, at 24-25), the explicitly stated reasons for establishing a standardized disregard do not apply to tax withholdings. Moreover, the amount of tax withholdings for most working recipients leaves no room for an allowance for the very out-of-pocket expenses intended to be covered. Congress' explicit reasons for enacting a $75 work expense disregard are effectively rendered meaningless.

Congressional bills should be read so as to give meaning to the stated purposes of specific provisions as well as the overall purposes of the Acts amended. While the general effect of the OBRA amendments was to limit AFDC eligibility, the OBRA changes did include provisions that had the opposite intention.[*] Similarly, not including tax withholdings within the $75 work expense provision need not result in a negative fiscal effect everywhere to meet the intent of Congress.[**]

In contrast, considering mandatory payroll tax withholdings apart from the $75 work expense disregard specified in § 402(a)(8)(A)(iii) gives meaning to Congress' stated purposes for its enactment and does not treat such purposes as only a pretext for saving costs. Furthermore, such an interpretation avoids a major inconsistency with one

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[*]For example, prior to OBRA but not after, states were able to exclude an otherwise eligible family if it owned its own residence or if the value of the residence exceeded a certain property value limitation. Pub. L. 97-35, § 2302, 95 Stat. 357, 844 (1981), 42 U.S.C. § 602(a)(7)(B) (Supp. V 1981).

[**]It is noteworthy, however, that in California, including just out-of-pocket expenses such as transportation does have a cost savings effect. *See* Green v. Obledo, 29 Cal. 3d 126, 172 Cal. Rptr. 206, 624 P. 2d 250 (1981), which held that California's method for determining transportation costs before OBRA resulted in unlawfully low allowances for AFDC recipients; *see also* California Department of Social Services, AFDC Social and Economic Characteristics, *supra* (J.A. 82), for work expense figures unadjusted in light of Green and for inflation. To include also payroll taxes, has, of course, a greater impact in fiscal savings, but it has as well an unfair and punitive effect upon working recipients.

of the overarching purposes of the AFDC program, which is to encourage self-support. 42 U.S.C. § 601 (1976). Both the stated reasons for Section 402(a)(8)(A)(ii) and this continuing, overall objective of the AFDC program argue strongly against the Secretary's single-minded emphasis on the savings aspect of OBRA as the sole measure for interpreting the 1981 legislation.

Second, the Secretary's interpretation permits the double counting of recipient income from earnings, which can result in multiple reductions of a family's AFDC grant attributable to a single source of funds. Such double counting occurs because of the interaction of various policies that a state like California applies in determining AFDC grants.

Both before and after OBRA, California required tax refunds to be treated as "income" available to the household and, thus, applied the entire amount of the refund to decrease the family's AFDC grant. For reasons unrelated to the issue here, the California Supreme Court recently declared this policy unlawful and held that taxes had to be treated as an available "resource" rather than as available "income". *Farrow v. Woods*, 35 Cal. 3d 749, 200 Cal. Rptr. 893, 677 P. 2d 1183 (1984), *cert. pet. pending* (filed June 21, 1984). Tax refunds do not operate to reduce the AFDC grant, so long as they fall within the statutory limitation established for all "resources". In practical terms, the joint effect of California's preferred implementation of both the work expense and tax refund policies had been to treat a single source of funds—withheld taxes—as a basis for reducing a family's AFDC grant both at the time the funds were first withheld from earnings and again should any of the withheld taxes be returned to the recipient in the form of a tax refund.[20]

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[20] A similar result with respect to general assistance programs, which do not receive federal funds, has been regarded by state courts as illogical and establishing irreconcilable inconsistencies.

Another example concerns the operation of the new deeming provisions with respect to the earned income tax credit (EIC). Pub. L. 97-35, § 2305, 95 Stat. 357, 846 (1981), 42 U.S.C. § 602(d)(1) (Supp. V 1981). The EIC, which is not itself tied to the AFDC program, is usually implemented as a reduction in tax liability for low income earners, and it is usually triggered by the employee requesting an employer to make the adjustment each pay period. Internal Revenue Code of 1954, 26 U.S.C. § 3507(a) (Supp. V 1981). Under the new OBRA provisions, the EIC is deemed available to the AFDC household on a monthly basis even if the working recipient has not requested the employer to make this tax adjustment, and taxes have been withheld at the regular rate without benefit of the EIC.

The combined effect of the new EIC provision and the Secretary's interpretation of the $75 work expense disregard is the imputed availability for current support needs of both the higher tax amount withheld and the amount of the EIC, which represents a supposed reduction in this tax amount. In other words, in cases when the working recipient has not requested the EIC, the two provisions as interpreted by the Secretary interact so that the same withheld taxes become the basis for twice reducing a family's grant, in this instance in the same month.

These two examples highlight the irrationality of the Secretary's position in the context of other related AFDC provisions. Continuing to give independent effect to the use of take home pay in accordance with the actually available income principle of Section 402(a)(7)(A) avoids such double counting and thereby vitiates what are otherwise highly unreasonable and certainly unintentional legislative consequences. In sum, the requirements of Section 402(a)(7)(A) and Section 402(a)(8)(A)(ii) must be con-

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Watson v. Commonwealth of Pa. Dept. of Public Welfare, 400 A. 2d 669 (1979); *Harbolic v. Berger*, 400 N.Y.S. 2d 780, 381 N.E. 2d 499 (1977).

sidered separately if the AFDC program is not to be tortured into a Catch-22 economic nightmare for working AFDC recipients.

Given the complicated history of the relevant statutory provisions, there are some administrative issues at the periphery, which do remain somewhat uncertain. Accordingly, the Ninth Circuit limited the ambit of its decision to mandatory payroll taxes. *Turner v. Prod, supra*, 707 F. 2d at 1124 (Supp. App. 35a). Such tax withholdings clearly fall within the core deductions excluded from the concept of take home pay, and they represent a clear and principled line distinguishable from other expenses or deductions related to employment.[46]

While the issue before this Court is new, statutory interpretation in the aftermath of different and, at times, facially unclear amendments to related provisions of the Social Security Act is not new to the courts. In *Rosado v. Wyman*, 397 U.S. 397, 412, 90 S. Ct. 1207, 25 L. Ed. 2d 442 (1970), this Court commented that Congress in refining the AFDC program at times "has voiced its wishes in muted strains and left it to the courts to discern the theme in the cacophony of political understanding." Here the lower courts reconciled the applicability of two con-

[46]Although other items, such as mandatory retirement contributions or union dues, fall within the penumbra of the notion of mandatory payroll deductions, they do not affect all working recipients in the same, across-the-board way as tax withholdings and, thus, are arguably analytically distinguishable. Deductions for mandatory retirement programs or union dues are, like taxes, ones over which working recipients may not have any options. However, only government employees usually are subject to mandatory as compared to discretionary retirement programs, and most working recipients are not likely to be in unionized jobs because the generally higher pay would make them ineligible for AFDC benefits. Wage garnishments, an example cited by California State Respondents, are not conceptually similar to mandatory payroll taxes since the underlying debts are voluntarily incurred and are not determined by operation of law. Brief for State Respondents in Support of Petitioners 10.

tinuing provisions of the AFDC program so as to give meaning to Congressional action taken not just in 1981 but also in 1939, 1962 and 1967.

The courts below were mindful of this Court's admonition in *Skea v. Vialpando, supra*, 416 U.S. at 253, in construing AFDC legislation, to "look to (1) the language and (2) the underlying purposes of the Act." *Turner v. Prod, supra*, 707 F. 2d at 1121 (Supp. App. 29a). They therefore considered each relevant amendment in its specific legislative context and deferred to longstanding administrative interpretations when illuminating, but refused to adopt the Secretary's position with respect to the instant issue since it was inconsistent with the history and purposes of the provisions in question. Just as this Court has done in other AFDC cases,[47] the lower courts in the end refused to defer to the Secretary's interpretation of Section 402(a)(7)(A), when in the cacophony of different congressional voices at different times there never was an explicit or implicit repeal of the applicability of the "actually available" income principle to payroll tax withholdings.

D. Post-OBRA Congressional Action Does Not Affect the Merits of the Statutory Issue Now Before This Court.

Adding to the complexity of the issue now before this Court, Congress this past month has enacted a new subsection to Section 402(a)(8), which specifies a definition of "earned income" similar to the one previously found in HHS regulations. *See* Deficit Reduction Act of 1984, HR 4170, § 2625, 130 Congressional Record H6552 (June 22, 1984), Pub. L. 98-369, § 2625 (July 17, 1984). This new amendment adds the following provision:

> (e) provide that in implementing this paragraph the term "earned income" shall mean gross earned income,

[47]*See e.g., Carleson v. Remillard*, 406 U.S. 598, 92 S. Ct. 1932, 32 L. Ed. 2d 352 (1972); *Townsend v. Swank*, 404 U.S. 282, 92 S. Ct. 502, 30 L. Ed. 2d 448 (1971).

prior to any deduction for taxes or for any other purposes.

This amendment sets the meaning of "earned income" as used in Section 402(a)(8). Like the OBRA changes, it does not on its face affect the meaning of the term "income" as used in Section 402(a)(7)(A).

The accompanying legislative conference report, however, does reference the instant litigation. *See* 130 Congressional Record H6748. This reference is itself confusing and ambiguous since neither the legislation nor the report addresses the directly controlling applicability of Section 402(a)(7)(A) to the case at-hand. Previous congressional reports regarding this change are no more illuminating since they too address exclusively determinations under Section 402(a)(8). *See* House Report 98-664, 98th Congress, 2nd Sess., at 15 (April 9, 1984) and Senate Report 98-300, 98th Congress, 1st Sess., at 167-168 (November 4, 1983). Like the 97th Congress, the 98th Congress evinces no awareness that what is at issue is the longstanding use of take home pay under Section 402(a)(7)(A) to compute a household's "actually available" income. *See Turner v. Fred*, *supra*, 707 F. 2d at 1121 (Supp. App. 28a). The task of accommodating actions taken by earlier Congresses with actions taken by Congress during the 1980's is still left with the judiciary.

This Court has regarded with skepticism the views of a subsequent Congress as to the intent of an earlier one. *See U.S. v. United Mine Workers*, 330 U.S. 258, 281-282, 67 S. Ct. 677, 91 L. Ed. 884 (1947). To the extent the congressional reports on the 1984 legislation signify an attempt to revise legislative history in response to the instant litigation, they are of dubious value. The least that can be said is that Congress' action this session is a flimsy basis upon which to infer a repeal three years earlier of the applicability of Section 402(a)(7)(A) to mandatory payroll taxes. Indeed, it is probably more accurate to state that the statutory enactment of an "earned income" defini-

tion now is, if anything, an admission that Congress in 1981 did not consider the issue before this Court.

The new legislation carries little weight retrospectively. Whether it effects a repeal prospectively is something which the lower courts have not yet had a chance to consider. In light of this new development, this Court has two basic options: It can address the merits of the case and, as AFDC respondents have shown in this Brief, affirm the thoughtfully reasoned decision of the Ninth Circuit; or it can dismiss the writ of *certiorari* as improvidently granted.

While this Court usually does not dismiss writs of *certiorari* as improvidently granted, it has followed this procedure when there has been an intervening legislative change or other development which directly bears on the circumstances of the case. *E.g., Triangle Improvement Council v. Ritchie*, 402 U.S. 497, 501, 91 S. Ct. 1650, 29 L. Ed. 2d 61 (1971); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 77, 75 S. Ct. 614, 99 L. Ed. 897 (1955). If the present case is now of only retrospective interest, it does not warrant a decision on the merits since it involves neither a constitutional question nor a statutory issue of continuing importance. If the Secretary regards the recent legislation as a fresh source of authority for her position, such legislation properly should be considered in the first instance by the lower courts, not this Court.

CONCLUSION

For the foregoing reasons, AFDC Respondents respectfully request the Court to affirm the decision of the court of appeals or, in deference to the changed circumstances of this case due to the passage of recent legislation, dismiss the writ of *certiorari* as improvidently granted.

Dated: July 23, 1984

Respectfully submitted,

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Appendix A

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SURVEY OF STATES SHOWS FY 1982 WELFARE SAVINGS LESS THAN HALF ADMINISTRATION ESTIMATES

Survey Findings. Results of a nationwide survey by the American Public Welfare Association (APWA) show that cuts in the federal aid to families with dependent children (AFDC) program, authorized by the Omnibus Budget Reconciliation Act of 1981, will save only $432.5 million in this fiscal year—not $1.035 billion as originally predicted by the Reagan Administration.

Most of the cuts authorized by the Act were to go into effect last October 1, even though states had argued that this would not provide enough time to implement the changes. However, the state survey, conducted in the last quarter of 1981, reveals that federal savings estimates are nearly double what states say they would have achieved if full implementation had occurred on schedule. Additionally, significant implementation delays in many states caused by state legislative requirements, court orders, and administrative problems are expected to further reduce the FY 1982 savings to about 42 percent of the federal estimates.

Approximately 725,000 poor families also will be affected by the cuts. That figure represents 66,000 more families than the administration predicted. Fewer cases will be closed (301,161 as compared to administration estimates of 400,836); but many more families will experience benefit reductions (415,156 as compared to the federal estimate of 258,528). Nationwide, 3.8 million families were receiving AFDC in December, 1980, the latest month for which official figures are available.

State savings are expected to total $295.1 million in FY 1982 as a result of the cuts. The administration did not include state dollar savings in its projections.

What the Survey Numbers Represent. All 50 states, the District of Columbia, and the U. S. territories were queried in the APWA survey. Data were supplied by 40 states, the District of Columbia, and Puerto Rico. The states responding represent roughly 65.9 percent of the total federal payments for AFDC in FY 1980.

APWA's estimates of nationwide savings are based on the assumption that savings in the states that did not report will be proportionately the same as those in reporting states.

Why State Estimates Differ from Federal Estimates. APWA conducted the survey, with the support of the National Governor's Association, because states were concerned that federal savings estimates might be inaccurate due to limited national data, and that implementation delays would reduce savings. Most states were concerned that the lead time for implementation of the law was unrealistic (interim regulations were released on September 21, 1981, just 10 days before hundreds of thousands of welfare cases had to be closed and benefit changes had to be put into

effect in several federal programs). There was also concern about the procedures used by the federal government to estimate savings. The states were not involved in formulating the federal projections and a number of officials have contended that the 1979 study, on which the administration based its estimates, is out-of-date and inaccurate.

The APWA report cites several major reasons for differences in the estimates:

> while the total cases affected will probably come close to or exceed federal expectations, fewer cases will be closed and more will simply involve benefit reductions —thus, aggregate savings will be much lower than expected;
>
> more people could be eligible for AFDC because of the effects of the recession, and earnings of AFDC families may be declining because of the effects of high unemployment;
>
> the short implementation period did not allow time for state legislatures to remove valid state law impediments, and 15 states had to be granted full or partial waivers for this reason;
>
> some provisions of the law, such as work programs and retrospective accounting procedures, require substantial planning before implementation can occur;
>
> the administration underestimated the effects of interactions between AFDC and other benefit programs and within the AFDC program itself, so that simultaneous eligibility and benefit changes caused some families to retain eligibility;
>
> no state has opted to count food stamps as income and only one has chosen to offset housing subsidies in the AFDC grant, usually because state AFDC grants have not kept pace with the cost of living and states are reluctant to reduce them further, or because the time has not been available to consider these options; and

federal estimates did not account for the effects of lawsuits and waivers (at least 21 states have applied for full or partial waivers of implementation dates because of legislative and administrative complications, and at least 27 lawsuits filed across the country affected implementation dates or savings in various ways).

At the same time, state data indicate that several provisions of the new law appear to be saving substantially more money than the administration anticipated. For example, administration officials expected "negligible savings" from a provision limiting AFDC eligibility to families with gross incomes below 150 percent of each state's standard of need. States say this provision may net more than $92 million in federal savings.

In a few areas, both federal and state projections are seen as "educated guesses" because court decisions could affect expenditures and implementation or a large number of welfare recipients could be forced, by economic conditions or the loss of work incentives, to quit their jobs and apply for full benefits.

Other Results Reported. Despite implementation delays and inaccurate federal predictions, the survey reveals that states expect savings to be significant over time. Structural changes in the AFDC program resulting from the new law should substantially reduce federal and state spending for AFDC once the changes are fully implemented.

A number of states reported that the federal cuts have caused state officials and legislators to look for ways to protect households that continue to be needy. Seven states are planning to raise the official standard of need, the amount

determined by each state to be required to meet a family's subsistence needs. The standard serves as the basis for each state's AFDC payments, and the new law specifies that the gross income of AFDC recipients cannot exceed 150 percent of this standard. By raising the standard, states can allow more families to retain eligibility and can, in many cases, provide an incentive for working AFDC recipients to keep their jobs.

Additionally, several states said they will pick up all or part of the federal savings that resulted from the new dependent child age limit, the limit on aid to unborn children, the $10 minimum payment, and reduced federal matching funds for staff training. These states' commitments will further reduce state savings but could prevent expenditures in other state programs.

Conclusion. The survey findings reflect the magnitude of the task facing state governments as they work to implement a large number of federal program changes in a short time period. In most states, the same state and local government agencies are responsible for implementing simultaneous major changes in AFDC, food stamps, and Medicaid. Many of them are experiencing concurrent staff reductions and cuts in administrative budgets.

The survey findings show that the states are making a serious effort to implement the law as quickly as possible, but they point up the need for better coordination between the federal government and the states so that accurate information can be given to the Congress and the public regarding potential savings, and the speed with which major program changes can be accomplished.

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States' Own Estimates of the Cost and Caseload Effects of the AFDC Changes Made by the Omnibus Budget Reconciliation Act of 1981

National Estimates of FY 82 AFDC Savings*
(in millions of dollars)

	Federal Estimates of Full Year Savings	State Estimates of Full Year Savings		State Estimates of Savings by Actual Implementation Schedule	
	Federal	Federal	State	Federal	State
Earned Income Disregards	$379	$[illegible]	$[illegible]	$[illegible]	$ [illegible]
$1,000 Resource Limit	19	7.4	[illegible]	[illegible]	[illegible]
Food Stamp & Housing Offset	100	Negligible		Negligible	
150% Income Limit	Negligible	[illegible]	[illegible]	[illegible]	[illegible]
Lump Sum Payments	7	[illegible]	[illegible]	[illegible]	[illegible]
Earned Income Credit	31	[illegible]	[illegible]	[illegible]	[illegible]
Stepparent Liability	100	[illegible]	[illegible]	[illegible]	[illegible]
Work Options(3)	0	[illegible]	[illegible]	[illegible]	[illegible]
Dependent Child Age Limit	100	[illegible]	[illegible]	[illegible]	[illegible]
Unborn Child Coverage	19	[illegible]	[illegible]	[illegible]	[illegible]
Recoupment	115	[illegible]	[illegible]	[illegible]	[illegible]
Work Requirements—College	Negligible	[illegible]	[illegible]	[illegible]	[illegible]
Training Match	19	[illegible]	[illegible]	[illegible]	[illegible]
Strikers	3	[illegible]	[illegible]	[illegible]	[illegible]
$10 Minimum Payment	Negligible	Negligible		Negligible	
Retrospective Budgeting—Monthly Reporting	0	[illegible]	[illegible]	[illegible]	[illegible]
UP as Principal Earner	Negligible	[illegible]	[illegible]	[illegible]	[illegible]
Vendor Payment Limit	Negligible	Negligible		Negligible	
Alien Eligibility	19	Negligible		Negligible	
TOTAL	$1,[illegible]	$[illegible]	$[illegible]	$[illegible]	$[illegible]

*These national estimates have been calculated on the basis of the forty states responding to the survey. These states account for 65.9 percent of federal AFDC expenditures and 69.4 percent of the AFDC caseload.

[b]Itemized federal savings estimates actually total $[illegible] million although HHS has estimated total federal savings to be $1,[illegible].

[c]Total state estimates for full and part year savings exceed actual column totals because some states submitted only total data, all states did not respond to each item, some rounding error occurs, and negligible savings estimates are assumed.

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States' Own Estimates of the Cost and Caseload Effects of the AFDC Changes Made by the Omnibus Budget Reconciliation Act of 1981

National Estimates of FY 82 Caseload Impact*

	Federal Estimates of Caseload Impact		State Estimates of Caseload Impact	
	Cases Closed	Cases Reduced	Cases Closed	Cases Reduced
Earned Income Disregards	312,000[b]	—	81,198	190,429
$1,000 Resource Limit	18,000	—	4,987	0
Food Stamp and Housing Offset	—	—	0	2,085
150% Income Limit	7,000	—	107,550	0
Lump Sum Payments	5,000	—	1,857	2,358
Earned Income Credit	11,000	375,000	700	31,898
Stepparent Liability	130,000	—	63,108	25,958
Work Options(3)	—	—	1,873	3,602
Dependent Child Age Limit	25,000	75,000	20,007	61,180
Unborn Child Coverage	—	—	8,573	37,294
Recoupment	0	—	2,761	20,938
Work Requirements—College	—	—	5,870	1,761
Training Match	—	—	0	0
Strikers	1,000	—	1,012	0
$10 Minimum Payment	7,000	—	1,977	4,989
Retrospective Budgeting/Monthly Reporting	—	—	3,170	3,063
UP as Principal Earner	—	—	1,540	0
Vendor Payment Limit	—	—	0	8,513
Alien Eligibility	—	—	0	721
TOTAL	400,836[c]	258,528[c]	310,161	415,156

*These national estimates have been calculated on the bases of the forty states responding to the survey. These states account for 65.9 percent of federal AFDC expenditures and 69.4 percent of the AFDC caseload.

[b]Federal estimates assume that 96,000 cases will be closed, 116,000 reduced.

[c]Itemized federal estimates actually total 414,800 cases closed, 450,000 cases reduced, although federal officials most frequently cite 400,836 cases closed and 258,528 cases reduced as their estimate.

AMICUS CURIAE

BRIEF

No. 83-1097

IN THE

Supreme Court of the United States

October Term, 1983

MARGARET M. HECKLER, Secretary of Health and Human Services,

Petitioner,

against

SANDRA TURNER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR AMICUS CURIAE STATE OF NEW YORK IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

No. 83-1097

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BRIEF FOR AMICUS CURIAE STATE OF NEW YORK IN SUPPORT OF RESPONDENTS

Interest of the Amicus Curiae

New York offers this amicus curiae brief in support of the respondents. The amicus, like all the states, participates in the cooperative federal program that provides Aid to Families with Dependent Children. We are concerned about the well-being of the program's recipients, including the working poor, whose grants will be reduced and whose

costs will increase if petitioner is permitted to implement her erroneous interpretations of "income" under § 402(a)(7) and work expenses under § 402(a)(8)(A)(ii) of the Social Security Act. 42 U.S.C. § 602(a)(7), (a)(8)(A)(ii).

These interpretations have not been implemented in New York because of the restraining orders and preliminary and permanent injunctions issued against petitioner in *RAM* v. *Blum*, 533 F. Supp. 933 (S.D.N.Y. 1982), 564 F. Supp. 634 (S.D.N.Y. 1983).* There, as in the opinions below, "income" under § 402(a)(7) was held, contrary to petitioner's interpretation, to exclude withholding taxes. The *RAM* opinions are limited to this question, on which the writ was granted in this case (*compare* question presented in the Petition *with* question presented in the Brief for the Petitioner), and the Court may apply the same limitation here. Since the § 402(a)(8)(A)(ii) disregard petitioner's brief puts in issue refers only to § 402(a)(7) "income" applied to work expenses, a decision that excludes withholding taxes from § 402(a)(7) operates to exclude them from § 402(a)(8)(A)(ii). *RAM* v. *Blum*, 533 F. Supp. at 946; *see* opinion below, Supplemental Appendix ("Supp. App.") at 16a-17a, 36a.

The procedure New York uses to compute § 402(a)(7) "income" under *RAM* varies slightly from the California procedure required by the opinion below. *Compare* New

* The Commissioner of the New York State Department of Social Services was the original defendant in *RAM*. She joined petitioner as the action and did not defend on the merits. Petitioner appealed to the United States Court of Appeals for the Second Circuit from the final judgment (*see* 564 F. Supp. at 650) but has withdrawn the appeal without prejudice pending the Court's decision in this case.

York State Department of Social Services Administrative Directive 83 ADM-44 (September 16, 1983), Appendix 1 to this brief at ¶IV, 3a-4a, 7a-8a (including withholding taxes in "earned income" to calculate the § 402(a)(8)(A)(iv) work incentive disregard) *with* opinion below, Supp. App. 34a (excluding withholding taxes from "earned income" in same calculation). Both the New York and California procedures exclude withholding taxes from § 402(a)(7) "income", the figure from which all disregards are subtracted. Because *RAM* does not reach any question about § 402(a)(8) disregards, it does not consider § 402(a)(6) "earned income". New York applies the term, defined in 45 C.F.R. § 233.20(a)(6)(iv) as including withholding taxes, to calculate the amount of § 402(a)(8) disregards and properly limits it to that purpose.

Introduction and Summary of Argument

An individual's need for Aid to Families with Dependent Children and the amount of his grant are determined in three logical steps. First, the individual's income and resources are ascertained; then, statutory disregards are deducted; and last, income and resources, as reduced by the disregards, are subtracted from the state standard of need. The principal statutory provision is § 402(a)(7) of the Social Security Act, 42 U.S.C. § 602(a)(7). It initiates the three-step process and mandates the last step by requiring the determination of an individual's "need", which is also the measure of his grant. It mandates the first and second steps by requiring consideration of "income and resources", reduced "as . . . provided" in § 402(a)(8) of the Social Security Act, 42 U.S.C. § 602(a)(8). That section lists a

series of disregards from § 402(a)(7) "income and resources," including, at § 402(a)(8)(A)(ii), a $75 work expense disregard for employed recipients.

The parties dispute the treatment of withholding taxes, *i.e.* federal and state payroll levies for income tax, social security and disability benefits, in determining the amount of an employed recipient's grant. Petitioner contends that withholding taxes are "income" under § 402(a)(7) and would include them at the first step of the three-step process for that reason. She then contends that withholding taxes are work expenses under the § 402(a)(8)(A)(ii) disregard and would deduct them, or a portion up to the $75 limit, from § 402(a)(7) "income" at the second step of the process. Her contentions are without authority in federal statute or regulation, and the meanings she attributes to § 402(a)(7) and § 402(a)(8)(A)(ii) yield diminished grants and increased costs for recipients at the third step of the process.

Petitioner's errors of law are readily illustrated. As the opinion below holds (Supp. App. at 12a-17a, 36a), withholding taxes are excluded from § 402(a)(7) "income" because they are not "available" for the recipient's "support and maintenance." 45 C.F.R. § 233.20(a)(3)(ii)(D). This definition of § 402(a)(7) "income" is codified in petitioner's current regulation on point, § 233.20(a)(3)(ii)(D), and has been applied to the statute virtually since the inception of the AFDC program. Its terms are satisfied only if the recipient has money, or other resources, which he can use for a subsistence need, *e.g.*, food, travel to work. He cannot use withholding taxes for this purpose. Neither the

Omnibus Reconciliation Act of 1981, Pub. L. No. 97-35, 95 Stat. 357, nor the recent Deficit Reduction Act of 1984, Pub. L. No. 98-369 (July 18, 1984), refer to § 402(a)(7) "income" much less change its meaning.

If withholding taxes are excluded from § 402(a)(7) "income," they are excluded from the § 402(a)(8)(A)(ii) disregard because the disregard applies only to work expenses paid from § 402(a)(7) "income." Moreover, neither Congress nor the federal agencies that have administered the AFDC program have considered withholding taxes as work expenses to be deducted from § 402(a)(7) "income". To the contrary, the relevant legislative and administrative history demonstrates that work expenses have always been given their ordinary meaning, *i.e.*, the amount an individual pays to go to and from his job and to permit him to perform his duties. As the opinion below holds (Supp. App. 27a-28a, 36a), petitioner's opposing view urges, at best, an impermissible repeal by implication of a long-standing policy.

That the § 402(a)(8) disregard subsections use the term "earned income", defined in § 2625 of the Deficit Reduction Act of 1984 and 45 C.F.R. § 233.20(a)(6)(iv) to include withholding taxes, is irrelevant to petitioner's contentions about § 402(a)(7) "income" and the § 402(a)(8)(A)(ii) disregard. First, the term was added to § 402(a)(8) in 1967 to increase the amount of the work incentive disregard calculated under that provision, not to change the definition of § 402(a)(7) "income." Under the 1967 amendment, a recipient received a disregard of $30 plus one-third of his gross, not net, monthly employment income. The disregard was then subtracted, to the recipient's ad-

vantage, from his net § 402(a)(7) "income". Second, the term "earned income" has remained in the § 402(a)(8) disregard subsections to date and is still without any effect on § 402(a)(7) "income". Petitioner misreads the language in § 402(a)(7), "except as may be otherwise provided in . . . [a][8]", when she tries to use it as evidence that "earned income" under § 402(a)(8) is "income" under § 402(a)(7). The quoted language does not define § 402(a)(7) "income" or create an exception to it. It states that § 402(a) "income" will be affected, *i.e.* reduced, by the provisions or disregards in § 402(a)(8). As appears from the text of § 402(a)(8), these provisions simply base the calculation of the disregards on "earned income". They do not, contrary to petitioner's reading, direct the subtraction of the disregards, once calculated, from "earned income" rather than from § 402(a)(7) "income". Last, the use of the term "earned income" in § 402(a)(8) has no current effect on the § 402(a)(8)(A)(ii) work expense disregard because the $75 flat deduction eliminates the need to base the calculation on income, whether net or "earned."

ARGUMENT

POINT I

Withholding Taxes Are Not Income or Resources Under Section 402(a)(7) of the Social Security Act, and They Are Not Work Expenses Under Section 402(a)(8) of the Act.

A. Withholding Taxes Are Not "Income" Under Section 402(a)(7) of the Social Security Act.

Withholding taxes are excluded from § 402(a)(7) "income" because they are not "available" to the recipient. Opinion below, 12a-17a, 36a; *RAM* v. *Blum*, 533 F. Supp. 933, 941-47 (S.D.N.Y. 1982), 564 F. Supp. 634, 637-42 (S.D.N.Y. 1983). An express limitation of § 402(a)(7) "income" to "available" income was first adopted in 1940 by the federal agency that originally administered the AFDC program. (Joint Appendix ["J.A."]17) It is now codified in 45 C.F.R. § 233.20(a)(3)(ii)(D) (1983) (States must consider "[n]et income and resources available for current use" in determining need under § 402[a][7].). Petitioner at least implicitly concedes (brief, p. 17, n.7) that the Omnibus Budget Reconciliation Act of 1981 ("OBRA"), Pub. L. No. 97-35, 95 Stat. 357, did not change the meaning of § 402(a)(7) "income", and the text of her current regulation reflects that fact.*

---

* The recent Deficit Reduction Act of 1984, Pub. L. No. 98-369 (July 18, 1984), also has no effect on the meaning of "income" under § 402(a)(7) of the Social Security Act. Although the House Conference Report (No. 98-86) references this case, § 2825 of Pub. L. No. 98-369, the only potentially relevant provision, amends § 402(a)(8), not § 402(a)(7). The amendment adopts the definition of "earned income" in 45 C.F.R. § 433.20(a)(6)(iv) for the purpose of calculating the disregards provided in § 402(a)(8). It does not make any change in § 402(a)(7), and the House Conference Report does not suggest that it was intended to do so. See discussion *infra*, Point II.

Since 1940, § 402(a)(7) "income" has had to be "actually on hand or ready for use when needed" to be regarded as "available." (J.A. 19) Since 1942, "available income" has had to be capable of a "use" of "some appreciable significance in meeting the requirements of" the recipient. (J.A. 23) These prerequisites of availability—use "when needed" and use for recipient "requirements"—have been elaborated in the intervening years. They demonstrate, in contrast to the reading of § 402(a)(7) petitioner offers, that withholding taxes cannot be "available" "income" under § 402(a)(7).

First, a recipient can use only the "equity" in his income and resources "when needed." *See Nat'l Welfare Rights Org.* v. *Mathews*, 533 F. 2d 637, 647 (D.C. Cir. 1977) (invalidating regulation requiring AFDC recipients' real and personal property be valued at gross market value [without encumbrances] and rejecting federal government's contention that "because property is itself available, gross market value [not just equity] is available"); *Green* v. *Barnes*, 485 F. 2d 242 (10th Cir. 1976) (holding only "equity" in a home, not its gross market value, is "available" to AFDC recipients). A recipient has no "equity" interest in withholding taxes because he cannot obtain their value if he needs it. The government's tax claim is based on and arises simultaneously with the recipient's right to be paid, precluding the vesting of any "equity" interest. Indeed, the recipient's inability to acquire an "equity" interest in withholding taxes distinguishes these funds from the remaining portion of his earnings—his "net" income under 45 C.F.R. § 233.20(a)(3)(ii)(D). Contrary to petitioner's contention (brief pp. 30-31), this difference provides a

"principled boundary" (*id.* at 31) between withholding taxes and expenses incurred to obtain and retain employment, *e.g.* for transportation, uniforms.

Second, withholding taxes cannot be used for recipient "requirements." These "requirements" are his "support and maintenance." 45 C.F.R. § 233.20(*a*)(3)(ii)(D) (1983) ("[I]ncome and resources are . . . available both when actually available and when a recipient has a legal interest in a liquidated sum and has the legal ability to make that sum available for support and maintenance"). "Support and maintenance", as used in § 233.20(a)(3)(ii)(D), must be given its "ordinary meaning." *See e.g., Burns* v. *Alcala*, 420 U.S. 575, 580-81 (1975); *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980). The "ordinary meaning" is the goods and services a recipient needs to sustain himself.* An unemployed AFDC recipient needs shelter, food, clothing and necessary incidentals. He satisfies these needs, at the state determined subsistence level, with his AFDC grant. The employed AFDC recipient has the same needs for shelter, food and clothing plus others, *e.g.* transportation, uniforms and union dues. He satisfies them with his AFDC grant and with the portion of his earnings that he, in fact, receives.** He cannot satisfy them with withholding taxes he does not receive.

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* "Support" means "to supply with the means of maintenance (as lodging, food or clothing) or to furnish funds for maintaining . . . to provide a basis for the existence or substance of: serve as the source of material or immaterial supply, nourishment, provender, fuel, raw material, or substance of." Webster's Third New International Dictionary (1976). "Maintenance" means "the act of providing means of support for someone . . . the provisions, supplies, or funds needed to live on: means of sustenance." *Ibid.*

** Work expenses of an employed AFDC recipient have been recognized as part of his "support and maintenance" requirements

(footnote continued on next page)

Moreover, consideration of withholding taxes *vis-à-vis* § 402 (a)(7) "income" leads to anomalous results under petitioner's long-standing policy of treating income tax refunds as § 402(a)(7) "income". *See* January 26, 1982 letter from Alan Schwaber, State Program Officer for Region II, Department of Health and Human Services, to John W. Hickey, Assistant Commissioner, New York State Department of Social Services (Appendix 2 to this brief at 9a), and Department of Health, Education and Welfare Regional Office Directive OFA-ROD-79-7 (March 14, 1979) (Appendix 3 to this brief at 11a).* If income taxes may be § 402(a)(7) "income" when they are withheld, as petitioner argues, and they may also be § 402(a)(7) "income" when they are refunded, as petitioner's policy provides, then the same funds are counted twice as § 402(a)(7) "income"—first when they are paid to the government and again when they are returned to the recipient.

since at least 1942. (J.A. 24, 25) Correspondingly, funds paid for these "requirements," as distinguished from taxes withheld from that use, have been "income" under § 402(a)(7) virtually since the enactment of the provision in 1939. A mandatory deduction, or disregard, for these expenses was imposed in 1962. See discussion *infra*, Subpoint B (1).

* The policy is well known to Congress, which temporarily suspended it for 1974 tax refunds. *See* § 102 of the Tax Reduction Act of 1975, Pub. L. No. 94-12, 89 Stat. 28.

B. Withholding Taxes Are Not Work Expenses Under § 402(a)(8) of the Social Security Act.

1. Withholding Taxes Were Not Work Expenses Disregarded from § 402(a)(7) "Income" Before the Enactment of OBRA.

Work "expenses reasonably attributable to the earning of . . . income" became a mandatory offset against § 402 (a)(7) "income" in 1962. Pub. L. No. 87-543, 76 Stat. 188. This addition to § 402(a)(7) represented a Congressional acknowledgment that employed recipients have increased "support and maintenance" "requirements" and that § 402 (a)(7) employment "income" is not always sufficient to meet the "requirements" attributable to work-related items in addition to those attributable to basic subsistence needs. *See* S. Rep. 1589 (June 14, 1962), reproduced at 1962 U.S. Code Cong. & Admin. News 1943, 1960 ("[I]t is only reasonable" to take work expenses into account "since that portion of the family budget spent for work expenses has the effect of reducing the amount available for food, clothing, and shelter".).

The conclusion that withholding taxes were not included in "expenses reasonably attributable to the earning of [§ 402(a)(7)] income" under the 1962 amendment is required for many reasons. First, as shown in subpoint A, funds used for withholding taxes were never paid from § 402(a)(7) "income", and thus could not be offset as an expense against § 402(a)(7) "income" as the terms of the amendment required. *RAM* v. *Blum*, 533 F. Supp. at 946; *see* opinion below, Supp. App. 16a-17a, 36a. Second, a Report issued by the Department of Health, Education and Welfare in 1961 showed that the states did not consider

withholding taxes to be § 402(a)(7) "income". (J.A. 34) Third, withholding taxes are not part of the "family budget", the focus of Congressional concern in the 1962 amendment. Fourth, when the Department of Health, Education and Welfare implemented the 1962 amendment, it did not consider withholding taxes as an expense "reasonably attributable to the earning of [§ 402(a)(7)] income." *See* § 3140 of Handbook of Public Assistance Administration (April, 1964) (J.A. 39-41) (setting forth a detailed list of expenses within the meaning of the 1962 amendment with no reference to withholding taxes). Finally, withholding taxes are not within the "ordinary meaning" of employment-related expenses. *See, Burns* v. *Alcala, supra*, 420 U.S. at 580-81; *Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc., supra*, 447 U.S. at 108. Rather, employment expenses are "charges . . . incurred by an employee in connection with the performance of his duties . . . typically . . . transportation, meals and lodging while traveling [and] money given to an employee as reimbursement for such charges". Webster's Third New International Dictionary (1976).

The court below, like the court in *RAM* v. *Blum*, 564 F. Supp. 634 (S.D.N.Y. 1983), correctly rejected petitioner's argument (brief, pp. 19-20) that withholding taxes are a work expense because, by 1972, "virtually every state in the union" so considered them in their administrative procedures. As these courts observe, the process for eliminating withholding taxes from consideration as available income is irrelevant. "[T]here was no practical reason for states to distinguish on computation forms between items that were disregarded because they were not part of

income and those that were disregarded because they were work expenses." (*Id.* at 644; *see* opinion below, J.A. 27a, 28a). The point is illustrated by the procedure New York currently uses to calculate AFDC need and the amount of grants. Although New York does not consider withholding taxes as § 402(a)(7) "income", they are eliminated last in a series of deductions from that income. *See* Administrative Directive 83 ADM-44 (Sept. 16, 1983) (Appendix 1 at ¶IV, 3a-4a).

2. The Meaning of Work Expenses Was Not Affected by OBRA's Re-Codification of the Work Expense Disregard in Section 402(a)(8).

OBRA §§ 2301 and 2302 (95 Stat. 843, 844) affected the work expense disregard in two ways, neither of which changed the meaning of the disregard. Opinion below, 26a-28a, 36a. One OBRA amendment standardized "expenses reasonably attributable to the earning of . . . income" in pre-OBRA § 402(a)(7) at $75 for recipients with full-time employment. As petitioner correctly explains (brief, pp. 21-22), the $75 flat deduction was enacted solely to eliminate administrative complexity, error, abuse and variations in the work expenses recognized by different states under pre-OBRA itemization. *See* S. Rep. 97-139 (June 17, 1981), reproduced at 1981 U.S. Code Cong. & Admin. News 396, 767-68. A second OBRA amendment transferred the disregard, standardized at $75, from § 402(a)(7) to § 402(a)(8). Petitioner acknowledges (brief, p. 22) that the sole purpose of the transfer was to decrease the $30 and one-third work incentive disregard in § 402(a)(8).* *See* S. Rep. 97-

* The $30 and one-third "work incentive" disregard was added as § 402(a)(8) in 1967. See discussion *infra*, pp. 14-15. It was recodified as § 402(a)(8)(A)(iv) by OBRA.

139, 1981 U.S. Code Cong & Admin. News at 701, 768. Neither amendment re-defined the items to be disregarded. Accordingly, since withholding taxes were not included in "expenses attributable to the earning of . . . income" under § 402(a)(7) when the disregard was enacted, and they were not added by OBRA, they are not included in the post-OBRA work expense disregard.

Petitioner's lengthy argument (brief, pp. 38-47) that the inclusion of withholding taxes in the flat $75 "work expense" disregard is consistent with OBRA's cost-cutting purpose misses the point. Although cost-cutting was certainly OBRA's general purpose, the purposes of the specific amendments to the work expense disregard—standardizing the deductible and reducing the work incentive disregard—show that they were not intended to cut costs associated with work expenses.

POINT II

The Inclusion of Withholding Taxes in "Earned Income" Under Section 402(a)(8) of the Social Security Act Does Not Include Those Taxes in Section 402(a)(7) "Income".

The term "earned income" was added to the Social Security Act by a 1967 amendment requiring a work incentive disregard from § 402(a)(7) "income and resources." *See* Pub. L. No. 90-248 § 202(b), 81 Stat. 881 (1968); S. Rep. 744 (Nov. 14, 1967), reproduced at 1967 U.S. Code Cong. & Admin. News 2834, 2994-95. The amendment added § 402(a)(8) and required a disregard equal to "the first $30 of

the earmned income for the month, plus one-third of the remainder of such income for such month".*

The purpose of OBRA's transfer of the work expense disregard from § 402(a)(7) to § 402(a)(8) in 1981 was to decrease the size of the work incentive disregard. *See* discussion *ante*, pp. 13-14. The decrease is accomplished by requiring the work incentive disregard to be calculated on the amount of "earned income" remaining after the $75 work expense disregard has been subtracted from that income.**

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* After the 1967 amendment, the determination of AFDC needs and grants for employed recipients under § 402(a)(7) consisted of the following steps:

1. determine the amount of "earned income" under § 402(a)(8);
2. calculate the amount of the $30 and one-third work incentive disregard under § 402(a)(8), based on "earned income";
3. determine the amount of § 402(a)(7) "income and resources";
4. determine the expenses attributable to the earning of income under § 402(a)(7); and
5. deduct both the $30 and one-third work incentive disregard and the expenses attributable to the earning of income from § 402(a)(7) "income and resources".

** The post-OBRA calculation of AFDC needs and grants for employed recipients under § 402(a)(7) consists of the following steps:

1. determine the amount of "earned income" under § 402(a)(8);
2. deduct the $75 standard work expense disregard (or a lesser amount if the recipient is not employed full-time) from "earned income" under § 402(a)(8);
3. calculate the $30 and one-third work incentive disregard based on the "earned income" remaining after step 2;
4. determine the amount of § 402(a)(7) "income and resources"; and
5. deduct both the $75 standard work expense disregard (or a lesser amount if the recipient is not employed full-time) and the $30 and one-third work incentive disregard from § 402(a)(7) "income and resources".

Compare pre-OBRA § 402(a)(7) needs/grant calculation for employed recipients set forth in the first footnote above.

"Earned income" is defined in 45 C.F.R. § 233.20(a)(6)(iv) as "the total amount irrespective of personal expenses, such as income-tax deductions, lunches, and transportation to and from work, and irrespective of expenses of employment which are not personal, such as the cost of tools, materials, special uniforms, transportation to call customers". The definition has been judicially approved because it increases payments to recipients, a result consistent with Congressional intent in enacting the work incentive disregard. *See, Conn. State Dept. of Public Welfare* v. *Dept. of Health, Education and Welfare,* 448 F. 2d 209, 214 (2d Cir. 1971); *Arizona State Dept. of Public Welfare* v. *Dept. of Health, Education and Welfare,* 449 F. 2d 456, 470 (9th Cir. 1971).

Although the purpose of the definition of "earned income" is to increase the size of disregards, thus increasing AFDC grants, petitioner contends that the term controls the definition of § 402(a)(7) "income" and applies it to decrease AFDC grants.* The argument (brief, pp. 34-35) relies on the introductory language of § 402(a)(7): "except as may otherwise be provided in [§ 402(a)(8)] . . .". Ac-

* AFDC grants diminish under petitioner's erroneous reading of § 402(a)(7) because withholding taxes, added to § 402(a)(7) "income" at step one of the needs/grant determination process, are offset by $75, at most, at step two, when § 402(a)(7) "income" is reduced by the § 402(a)(8)(A)(ii) work expenses disregard. As a result, the § 402(a)(7) "income" figure subtracted from the standard of need at step three, which determines need and the amount of the grant, is much larger than it would be if withholding taxes were eliminated from § 402(a)(7) at the outset. Recipients also suffer increased costs beyond those occasioned by the subtraction of an inflated § 402(a)(7) "income" figure from the standard of need. Under petitioner's erroneous reading of § 402(a)(8)(A)(ii), all, or part, of the work expense disregard is used to offset withholding taxes. As a result, the recipient either cannot offset any of his actual work expenses or can offset only a part of them.

cording to petitioner, the "exception" applies to the *definition* of § 402(a)(7) "income" and replaces that definition, as set forth in 45 C.F.R. § 233.20(a)(3)(ii)(D), with the definition of "earned income" in § 233.20(a)(6)(iv), now codified at § 420(a)(8)(C). Deficit Reduction Act of 1984, § 2825, Pub. L. No. 98-369 (July 18, 1984).

Petitioner misreads the phrase "except as may otherwise be provided in [§ 402(a)(8)]." The phrase is not an exception to the *definition* of § 402(a)(7) "income", as set forth in 45 C.F.R. § 233.20(a)(3)(ii)(D). It is an exception to the § 402(a)(7) requirement that the states "shall, in determining need, take into consideration *any* . . . income and resources". (Emphasis supplied.) The exception requires states to consider all § 402(a)(7) "income" *except* amounts required to be disregarded from that income under § 402(a)(8). The text of § 402(a)(8) then provides that "in making the determination [of need and grant amount under § 402[a]](7), any calculations concerning the disregards required by § 402(a)(8) are to be based on "earned income". Contrary to petitioner's reading, the exception does not suggest, much less require, that the resulting disregards are to be deducted from "earned income" rather than from § 402(a)(7) "income". Indeed, the reading of the exception language in § 402(a)(7) the amicus offers and the limited role of "earned income" in § 402(a)(8) we assign is the only interpretation of the statutes consistent with petitioner's acknowledgement (brief, p. 22) that the sole purpose of the transfer of the work expense disregard from § 402(a)(7) to § 402(a)(8) was to decrease the size of § 402(a)(8) work incentive disregards.

Further evidence of petitioner's error is the incorporation of § 402(a)(31) in § 402(a)(7). Section 402(a)(31)

was added by § 2306 of OBRA (95 Stat. 846) and requires that in determining needs and grants under § 402(a)(7), certain specified *income* of a dependent child's stepparent be taken into account. The purpose of § 402(a)(31) was to change the then current law which eliminated stepparent income from § 402(a)(7) "income" unless the stepparent was legally responsible for the child under state law. *See* S. Rep. 97-139, 1981 U.S. Code Cong. & Admin. News at 772-73.

OBRA's addition of § 402(a)(31) shows that Congress was aware of the established definition of § 402(a)(7) "income and resources" and that when it chose to amend the definition, it did so unambiguously. Additional proof of Congress' awareness of definition of § 402(a)(7) "income and resources" appears in S. Rep. 97-139, 1981 U.S. Code Cong. & Admin. News at 769, where Congress discusses and accepts the interpretation of § 402(a)(7) "income and resources" in *Nat'l Welfare Rights Org.* v. *Mathews, supra*, 533 F. 2d 637. It is therefore manifest that the only exception Congress intended to make in the definition of § 402 (a)(7) "income and resources" was the exception set forth in § 402(a)(31). *See Lorillard* v. *Pons*, 434 U.S. 575, 580-581 (1978) (When Congress exhibits its awareness of the interpretation of a statute and re-enacts the statute without change, the presumption that Congress has adopted the prior interpretation is especially strong.); *Nat'l Labor Relations Board* v. *Gullett Gin Co.*, 340 U.S. 361, 366 (1951) (same). Thus, the court below correctly refused to hold that Congress had "repealed a forty-year-old policy [defining § 402[a][7] "income"] by implication". (Supp. App. 28a).

Conclusion

For the Foregoing Reasons, the Holding Below That Withholding Taxes Are Not "Income" for Purposes of AFDC Calculations Performed Pursuant to Section 402(a)(7) of the Social Security Act Should Be Affirmed.

Dated: New York, New York
July 23, 1984

Respectfully submitted,

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* The Attorney General gratefully acknowledges the assistance of Russell Bennett, Associate Counsel of the New York State Department of Social Services, and Chong Mi Lah, a Law Intern with the Department, in the preparation of this brief.

APPENDICES

APPENDIX 1

[SEAL]

NEW YORK STATE
DEPARTMENT OF SOCIAL SERVICES
40 North Pearl Street, Albany, New York 12243

CESAR A. PERALES
Commissioner

[An Administrative Directive is a written communication to local Social Services Districts providing directions to be followed in the administration of public assistance and care programs.]

TRANSMITTAL NO: 83 ADM-44
[Income Maintenance]

Date: September 16, 1983

ADMINISTRATIVE DIRECTIVE

TO: Commissioners of Social Services

SUBJECT: Budgeting Mandatory Payroll Deductions: *RAM, et al.* v. *Blum, Schweiker and Krauskopf*

SUGGESTED DISTRIBUTION: All Public Assistance Staff
All Medical Assistance Staff

FILING REFERENCES

Previous ADMs/INFs—81 ADM-55, 83 ADM-17, 83 ADM-22

Releases Cancelled—81 ADM-55 Parts Cancelled

Dept. Regs.—352.19

Social Services Law and Other Legal References—

Bulletin/Chapter Reference—MB 134

Miscellaneous Reference—GIS: 11/21/82, 1/22/82, 2/11/82 and 3/11/82; 82 MA 005, 82 MA 006 and 82 MA 031; *Source Book*: XVI-F-3

CONTACT PERSON: Any questions concerning this release should be directed to Hallie Schroeder, Bureau of Income Support Programs, by calling (800) 342-3715, extension 4-9343. Medical Assistance questions should be addressed to your Medical Assistance representative at extension 3-7581, or in New York City at (212) 587-4853.

I. *PURPOSE*

The purpose of this directive is to advise local districts that a decision has been issued in the case of ***RAM, et al.*** v. ***Blum, Schweiker and Krauskopf,*** and that the budgeting currently in effect under the preliminary injunction issued in that case has been permanently mandated. As a result, local districts must continue to deduct mandatory taxes from the earnings of public assistance applicants/recipients in determining the eligibility for, and amount of, public assistance.

II. *BACKGROUND*

Local districts were advised of budgeting requirements resulting from a preliminary injunction in the case of *RAM, et al.* v. *Blum, Schweiker and Krauskopf* in GIS messages dated 1/21/82, 1/22/82, 2/11/82 and 3/11/82. This injunction barred the Department from implementing provisions of 81 ADM-55 to the extent that this directive did not allow the deduction of mandatory payroll taxes from earnings. Local districts were required under the preliminary injunction to deduct mandatory taxes from the earnings of public assistance applicants/recipients after all other appropriate earnings disregards had been applied.

On June 15, 1983, the court issued a permanent injunction mandating the deduction of mandatory payroll taxes as ordered under the terms of the temporary injunction. A copy of the injunction is attached to this directive (Attachment 1). Your compliance with this injunction is necessary to avoid a finding of contempt.

III. *PROGRAM IMPLICATIONS*

Because employed applicants/recipients are currently being budgeted correctly under the terms of the preliminary injunction, the issuance of the permanent order in this case has no program implications.

IV. *REQUIRED ACTION*

A. *Determining Net Earned Income*

Local districts must determine initial financial eligibility and must budget public assistance cases having earned income using the appropriate earnings disregards, applied in the following order:

1. Determine gross earnings
2. Subtract the $75 or $50 work expense disregard, as appropriate.
3. Subtract the actual cost of child care up to $160 per child.
4. Subtract the $30 and 1/3 incentive, if applicable.
5. Subtract mandatory payroll deductions from wages (i.e., mandatory federal, state and local

taxes, FICA and disability insurance withholdings).

Note: When there is more than one earner in the public assistance case and the sum of an individual earner's work expense, child care and mandatory combined taxes is greater than that individual's gross earnings, the child care expense up to $160 per child and the taxes not covered by that individual's actual earnings must be "rolled over" and applied against the earnings of the other earner in the household. This roll over of negative earned income is performed automatically by the ABEL system.

B. *Earnings Disregards Sanctions*

Recipients sanctioned from receiving the earnings disregards (for example, recipients who fail to make timely report of income) are still entitled to have mandatory payroll deductions subtracted from their gross earnings in determining the amount of their public assistance grants.

C. *Medical Assistance Implications*

In 83 ADM-22 you were advised of the budgetary methodology to be used when determining net earned income for class members affected by *Grekich* v. *Toia* (ADC related, under 21 or children in intact families). Local districts shall continue to budget all such federally related individuals having earned income in the manner described on page 4, Section IV.B of 83 ADM-22.

To determine the net earned income for federally non-participating individuals (MA HR related)

local districts shall follow the procedures outlined in Section IV.A of this directive.

Earned income of all SSI related persons will continue to be budgeted in accordance with the provisions of 83 ADM-17.

These policy changes have no effect on the budgetary methodology used to determine net income for individuals applying for assistance under the catastrophic illness program. Net income for this group is determined in the following manner:

1. Determine gross income.
2. Subtract actual work expenses.
3. Subtract actual child care expenses.
4. Subtract federal, state, local taxes, FICA, State disability benefit taxes.
5. Subtract 30 1/3 disregard, if applicable.
6. Subtract health insurance premiums.
7. Subtract court ordered support payments.

D. *WMS Implications*

1. *WMS/IM*

The basic budgeting methodology described in this directive is currently available on ABEL for PA ABEL budgets with FROM dates of February 1, 1982 or later.

2. *WMS/MA*

MBL is currently calculating MA HR-related budgets per method described in this directive and federally-related budgets per method in 83 ADM-22. The MA logic is also automat-

ically performing the roll over of negative income as outlined in Note in Section IV of this Administrative Directive for both federally-related and HR-related budgets.

E. *Food Stamp Implications*

The resulting public assistance grant must be used in computing food stamp benefits.

V. *EFFECTIVE DATE*

This release shall be effective September 15, 1983, retroactive to January 1, 1983.

MICHAEL J. DOWLING /sd

Michael J. Dowling
Deputy Commissioner
Division of Income Maintenance

ATTACHMENT 1

TEXT OF THE COURT INJUNCTION

Plaintiffs having moved for summary judgment, and the said motion having came on before the Court, and the Court thereafter on May 17, 1983, having handed down its opinion granting the plaintiff's motion for summary judgment, and the Court by Order dated February 25, 1982 having certified this action as a class action on behalf of all individuals who live in New York State who have earned income under Section 402(a)(8) of the Social Security Act (42 U.S.C. 602(a)(8)), as amended by the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35 95 Stat. 843 (2301), and apply for and/or receive Aid to Families with Dependent Children from and after December 15, 1981, it is

1. ORDERED and ADJUDGED that defendants Perales and Krauskopf and their officers, employees, agents, and successors-in-office are permanently enjoined to interpret and apply the term "income" in Section 402(a)(7)(A) of the Social Security Act (42 USC 602(a)(7)(A)), as amended by the Omnibus Budget Reconciliation Act of 1981, P.L. 97-35, 95 Stat. 843 (2302), in determining the needs of and the amount of assistance for class members as "net income," to wit, as salary, wages or compensation from whatever source excluding mandatory payroll deductions for federal, state and local taxes, social security ("FICA") and state disability benefits; and it is further

2. ORDERED and ADJUDGED that within sixty (60) days of the entry of this judgment defendant Perales shall issue an Administrative Directive revoking Administrative Directive 81-55 to the extent that it is inconsistent with the first decretal paragraph of this judgment; and it is furher

3. ORDERED and ADJUDGED that within one hundred and twently (120) days of the entry of this judgment defendant Perales shall amend the regulations of the New York State Department of Social Services, 18 NYCRR, as necessary to make them consistent with the first decretal paragraph of this judgment; and it is further

4. ORDERED and ADJUDGED that the issue of plaintiffs' entitlement to an award of attorneys fees and other costs is reserved for determination upon appropriate motion; and it is further

5. ORDERED and ADJUDGED that the Court retains jurisdiction over this action.

APPENDIX 2

[SEAL]

DEPARTMENT OF HEALTH & HUMAN SERVICES
Social Security Administration

Refer to:
SD2a

January 26, 1982

Region II
Federal Building
26 Federal Plaza
New York NY 10007

Mr. John W. Hickey
Assistant Commissioner
New York State Department of Social Services
Division of Income Maintenance
Ten Eyck Office Building
40 North Pearl Street
Albany, NY 12243

Dear Mr. Hickey:

This will confirm your conversation with Joanne Krudys relative to the treatment of income tax refunds.

We have discussed this issue with our central office staff and have been advised that States continue to have the option of treating tax refunds either as unearned income or as a resource.

If the State elects to treat the refund as unearned income, the monies would of course be budgeted in accordance with the lump sum provisions of Section 2303 of the Omnibus Budget Reconciliation Act of 1981. If however the State elects to treat the refund as a resource, it would not require

refund of the money until the resource limit of $1,000 is met. The treatment of tax refunds continues unrelated to the number of exemptions claimed by the client.

We are enclosing a copy of ROD-79-7 which defines the policy relative to this issue.

Sincerely,

/s/ Alan Schwaber
Alan Schwaber
State Program Officer
Office of Family Assistance

Enclosure

APPENDIX 3

Department of Health, Education and Welfare
Social Security Administration
Office of Family Assistance
Washington, DC 20201

Refer to: SFP-21 *REGIONAL OFFICE DIRECTIVE*
OFA-ROD-79-7

To : Regional Commissioners, SSA

Subject : Treatment of Income—Tax Refunds Arkansas—Information

Region VI requested clarification of current policy on the treatment of income tax refunds.

States have the option of choosing whether income tax refunds will be considered as unearned income in the month received and a resource thereafter, or as a resource alone. This is consistent with current policy giving States this option for treatment of lump sum payments which are in the nature of a "windfall". We intend to address this, in regulation, during recodification.

/s/ Barry L. Van Lare
Barry L. Van Lare
Associate Commissioner
for Family Assistance

cc: Assistant Regional Commissioners, OFA

REPLY

BRIEF

No. 83-1097

In the Supreme Court of the United States

OCTOBER TERM, 1984

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

SANDRA TURNER, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONER

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TABLE OF AUTHORITIES

In the Supreme Court of the United States

OCTOBER TERM, 1984

No. 83-1097

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

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Respondents' submission depends almost exclusively on the assertion that Section 402(a)(8) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(8), is essentially irrelevant and that "[t]he disposition of this case turns on the applicability of the 'actually available' income principle contained in Section 402(a)(7) • • • of the" Act (Resp. Br. 11). We have sufficiently answered this erroneous argument in our opening brief. It is perhaps a measure of the weakness of respondents' position that they doggedly continue to insist that Section 402(a)(8) is irrelevant even after Congress recently amended that subsection expressly to disapprove the court of appeals' decision in this case.

1. On July 19, 1984, subsequent to the filing of our opening brief, Congress enacted the Deficit Reduction Act of 1984, Pub. L. No. 98-369, 98 Stat. 494 *et seq.*, which

amends Section 402(a)(8) of the Social Security Act, 42 U.S.C. (Supp. V) 602(a)(8), to provide "that in implementing [Section 402(a)(8)], the term 'earned income' shall mean gross earned income, prior to any deductions for taxes or for any other purposes." The legislative history makes clear that Congress intended this amendment to resolve the issue presented in this case. See App., *infra*, 2a. The Conference Report (H.R. Conf. Rep. 98-861, 98th Cong., 2d Sess. 1394-1395 (1984)) states that "[t]he AFDC statute was amended in 1981 [in the Omnibus Budget Reconciliation Act (OBRA)] to change the way in which earned income is counted for purposes of determining eligibility and benefit amounts" and that

> [c]ourts in several States have been asked to interpret whether the term "earned income" refers to the gross amount earned by an individual before deductions are taken (for income taxes, insurance, FICA, support payments, or other items, regardless of whether the deduction is voluntary or involuntary), or whether the term refers to net earnings, after such deductions are taken. Regulations issued by the Department of Health and Human Services require that the term be interpreted as referring to gross earnings. The 3rd and 4th Circuit Courts of Appeal have ruled in the Department's favor. However, the 9th Circuit Court of Appeals has ruled that the term must be interpreted as referring to net earnings. The Supreme Court recently agreed to hear the case.

The legislative history also makes clear that Congress resolved the issue by ratifying the Secretary's interpretation of Section 402(a)(7) and (8), 42 U.S.C. (Supp. V) 602(a)(7) and (8). The Conference Report explains that the Act "[a]mends the AFDC statute to make clear that the term 'earned income' means the gross amount of earnings, prior to the taking of payroll or other deductions." H.R. Conf. Rep. 98-861, *supra*, at 1395.

Likewise, the Senate Report (1 Senate Comm. on Finance, 98th Cong., 2d Sess., *Deficit Reduction Act of 1984*, at 79, 88, 982 (Comm. Print 1984) [hereinafter cited as S. Prt. 98-169]) notes that the amendment "[c]larifies current law with regard to the definition of the term 'earned income' " by making a "technical clarification[ ]" and that

> [t]he provisions in the AFDC statute which require that specified amounts of earned income be disregarded in determining eligibility and benefits have historically been interpreted as requiring that such amounts be deducted from gross, rather than net, earnings.
>
> The Committee agrees with the Department that there was no intention to change this interpretation when it approved the 1981 AFDC amendments. The Committee notes that when the Congressional Budget Office estimated the savings expected to be derived from the changes in 1981, it followed the interpretation shared by the Department and the Committee that the proposed disregards would apply to gross earnings.

It is apparent, therefore, that the amendment to Section 402(a)(8) in the Deficit Reduction Act of 1984 eliminates any basis for the injunction in this case. As Justice Rehnquist pointed out in granting the government's application for a stay of the district court's injunction: "Effective July 18, 1984, petitioners are unambiguously directed by statute to deduct the work expense disregard from gross income, prior to any deductions for taxes or for any other purposes • • •" (App., *infra*, 3a).

Clinging to their contention that this case must be resolved solely by reference to Section 402(a)(7), respondents argue (Br. 47-49) that the effect of the recent amendment is ambiguous. But Congress's intent could not be stated more plainly. Respondents are thus reduced to arguing that

notwithstanding Congress's avowed desire to include mandatory withholdings within the $75 work expense cap, the legislature failed to achieve its goal because it fundamentally misunderstood the statutory scheme it created less than three years before. This assertion is plain nonsense. The only reasonable conclusion to draw from Congress's action is that tax withholdings are properly treated as work related expenses pursuant to Section 402(a)(8).

The Deficit Reduction Act of 1984 not only resolves prospectively the issue before this Court in favor of the Secretary's interpretation, but also eliminates any possible doubt about the correct result retrospectively. The recent amendment strongly endorses the Secretary's contention that the structure of the Act requires the inclusion of mandatory withholdings in the work expense disregard. As we argued in our opening brief (at 14), taxes are clearly included as part of earned income, and " 'earned income,' within the meaning of § [4]02(a)(8), is merely one kind of 'income' within the meaning of § [4]02(a)(7)." Pet. Br. 13, quoting *James* v. *O'Bannon*, 715 F.2d 794, 802 (3d Cir. 1983), petition for cert. pending, No. 83-6168. Accordingly, if a recipient earns any income, its treatment is prescribed by Section 402(a)(8). If respondents were correct (Resp. Br. 11) that the "operative meaning" of the term "income" in Section 402(a)(7) provides the sole basis for resolving this issue, then Congress would have been required to amend that term. It did not do so because it recognized that Section 402(a)(7) is limited by Section 402(a)(8), and therefore the latter subsection is the "operative" provision whenever the recipient has earned income.

Congress has thus demonstrated conclusively that the term income in Section 402(a)(7) was modified, as we contend, by the OBRA amendments to that provision and Section 402(a)(8). This interpretation by the present Congress of the interplay between Section 402(a)(7) and (8) in

the OBRA amendments enacted just three years ago is entitled to substantial weight. See *Bell* v. *New Jersey*, No. 81-2125 (May 31, 1983), slip op. 10; *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958); *United States* v. *Stafoff*, 260 U.S. 477, 480 (1923). Moreover, the fact that Congress expressly ratified (S. Prt. 98-169, at 88) the Secretary's interpretation of the prior AFDC statute is also compelling evidence that that interpretation is correct. See *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969); *FHA* v. *Darlington, Inc.*, 358 U.S. at 90. See also Resp. Br. 19.

Respondents attempt to blunt the effect of Congress's action by arguing (Br. 48) that "[t]his Court has regarded with skepticism the views of a subsequent Congress as to the intent of an earlier one." But this is not a case like *United States* v. *United Mine Workers*, 330 U.S. 258 (1947), where individual Members of the Senate had merely expressed their opinions during debates on the meaning of a statute that had been enacted eleven years earlier. Congress's amendment to Section 402(a)(8) was predicated on the explicit assumption that that provision directly controlled the treatment of withholding payments for working AFDC recipients. Congress's understanding of the prior law must now be given effect by the Court in order to ensure that the amendment achieves its expressed purpose.[1]

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[1]Perhaps the most telling indication of respondents' assessment of the strength of their position in light of the recent statutory amendment is their peculiar suggestion (Br. 6, 49) that the Court should dismiss the writ of certiorari as improvidently granted. That is clearly an inappropriate disposition of this case, because the new legislation in no way supports the decision below. On the other hand, the Court may wish to consider vacating the judgment of the court of appeals and remanding to that court for reconsideration of the issue in light of the intervening legislation. Since the case has been fully briefed, however, and the legislative history of the new amendment is so clear, we believe that the

2. Although the new amendment in the Deficit Reduction Act of 1984 lays to rest respondents' contention and the court of appeals' holding that Section 402(a)(7) and (8) can be interpreted as excluding tax withholdings from the $75 work expense disregard, respondents present several arguments regarding the 1981 OBRA amendments that warrant a brief reply. Respondents assert (Br. 42-49) that the Secretary's interpretation of Section 402(a)(7) "leads to a number of irrational consequences" that Congress could not have intended. Of course, this assertion has a decidedly hollow ring in view of Congress's recent actions, which plainly demonstrate an intent to include tax withholdings within the $75 disregard. In any event, respondents' arguments are insubstantial.

First, respondents contend (Br. 36, 42) that, at least in California, the average working AFDC recipient's tax withholdings exceed $75 per month, which "leaves no room for an allowance for the very out-of-pocket expenses intended to be covered" (Br. 43). This claim ignores the fact that "Congress's goal in enacting OBRA clearly was to reduce federal spending." *Minnesota* v. *Heckler*, 739 F.2d 370, 375 (8th Cir. 1984). See also *Sweeney* v. *Murray*, 732 F.2d 1022, 1029 n.11 (1st Cir. 1984). Congress did not set the limit at $75 because it thought that figure would assure each working recipient reimbursement for actual working expenses. Instead, as we pointed out in our opening brief (at 42-46), Congress was well aware of the charge that the amendments might create possible work disincentives.[2]

Court should decide the legal issue presented. This course would conserve judicial resources, particularly because there are numerous similar cases pending in district courts and courts of appeals throughout the country.

[2]As we observed in our opening brief (at 46-47), Congress adopted a different approach to encouraging AFDC recipients to work. In addition to the reasons listed previously, Congress also "mandated that participation in work programs be a condition of eligibility for aid." *Minnesota* v. *Heckler*, 739 F.2d at 375. See 42 U.S.C. (& Supp. V) 602(a)(19), 609.

Indeed, respondents' argument admits too much. Although the Department of Health and Human Services does not keep statistics on work expenses, it could well be that the average AFDC recipient spends more than $75 per month on transportation. In *Shea* v. *Vialpando*, 416 U.S. 251, 256 (1974), for instance, the AFDC recipient had been permitted to deduct $110 per month from her gross income for transportation expenses. Nonetheless, respondents could not seriously contend that Congress did not intend to include transportation expenses within the $75 work expense cap.[3]

Second, respondents argue (Br. 45-46) that if the Secretary does not permit the full withholding of taxes to be disregarded at the outset, that money may be double counted in "reducing" a family's AFDC grant. This contention is based on the fact that a great many AFDC recipients receive all or most of their withheld taxes as a refund, which may be counted as "income" when received by the recipient. As respondents concede (Br. 46), however, a tax refund is treated in California as "resources" rather than "income." *Vaessen* v. *Woods*, 35 Cal. 3d 749, 677 P.2d 1183, 200 Cal. Rptr. 893 (1984), petition for cert. pending, No. 83-2125 (filed June 22, 1984). Therefore, tax refunds do not affect an AFDC grant unless the recipient's resources level goes above $1000. 42 U.S.C. (Supp. V) 602(a)(7)(B). Moreover, even if the refund did reduce the grant, it still would not be "double counting" unless the recipient's work related expenses exceeded the $75 per month cap. This remote

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[3]Respondents also offer a wholly unconvincing explanation (see Br. 46) for distinguishing between tax withholdings and other mandatory tax payments, if (as they contend) the touchstone of income is the actual availability for living expenses. See Pet. Br. 31.

possibility of "double counting" hardly constitutes an "irrational consequence" that would cast doubt on the reasonableness of the Secretary's treatment of tax withholdings as a work related expense.[4]

Finally, respondents assert (Br. 45) that the earned income tax credit provision in the Omnibus Budget Reconciliation Act of 1981, 42 U.S.C. (Supp. V) 602(d)(1), operates with the $75 work expense cap to reduce a family's AFDC grant twice. 26 U.S.C. 3507. Respondents' quarrel, however, is not with the $75 work expense cap, but rather with the decision of Congress to deem the earned income tax credit as available income even if the AFDC recipient fails to notify his employer that he is eligible for the credit and therefore does not in fact receive it. In that event the recipient is treated as having more income than he in fact has. But respondents do not explain how the work expense cap operates in conjunction with the earned income tax credit provision to reduce the grant any more than the cap reduces the grant without the earned income provision. All that this argument demonstrates is that the two provisions operate independently to reduce the recipient's grant. Thus, nothing in the earned income tax credit provision of the AFDC statute undermines the Secretary's interpretation of Section 402(a)(8).[5]

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[4]Respondents' construction of Section 402(a)(7) and (8) is, if anything, more inconsistent with Congress's intent. Under respondents' theory, all AFDC grants would be increased, because tax withholdings would be deducted from gross income along with the $75 work expense disregard, yet most AFDC recipients would later recover the withheld taxes as a cash refund. But in many instances the refund would not reduce the recipient's grant because the resources allowance would not be exceeded. It seems wholly unlikely that Congress intended to exclude such clearly available income from a recipient's benefit determination.

[5]In any event, Congress in the Deficit Reduction Act of 1984, Pub. L. No. 98-369, § 2629, 98 Stat. 1137, amended 42 U.S.C. (Supp. V) 602(d) to exclude the earned income tax credit from an AFDC recipient's income unless and until it is actually received. Thus, to the extent respondents are correct that this provision worked in concert with Section 402(a)(8) to reduce a recipient's grant unfairly, it no longer does so.

For the foregoing reasons, and the reasons stated in our opening brief, it is respectfully submitted that the judgment of the court of appeals should be reversed.

REX E. LEE
Solicitor General

SEPTEMBER 1984

APPENDIX

Supreme Court of the United States

No. A-59 (83-1097)

MARGARET M. HECKLER, SECRETARY OF HEALTH AND HUMAN SERVICES, PETITIONER

v.

SANDRA TURNER, ET AL.

ON APPLICATION FOR STAY

[August 10, 1984]

JUSTICE REHNQUIST, Circuit Justice.

The Solicitor General, on behalf of the Secretary of Health and Human Services, requests that I stay, pending review by this Court, prospective enforcement of the permanent injunction entered by the United States District Court for the Northern District of California on July 29, 1982, and affirmed by the United States Court of Appeals for the Ninth Circuit. The issue before the District Court was whether the $75.00 standard work expense disregard in § 402(a)(8) of the Aid to Families with Dependent Children (AFDC) statute, 42 U.S.C. § 602(a)(8) (1976 ed., Supp. V), is deducted from net income or gross income in determining AFDC eligibility and benefits. That court concluded that the disregard was intended by Congress to be deducted from net income, and it entered a permanent injunction prohibiting state and federal officials

> "from including mandatory payroll deductions such as federal, state and local income taxes, Social Security taxes (F.I.C.A.) and state disability insurance within the definition of 'income' in interpreting and applying that term as used in Section 602(a)(7)(A) of Title 42 of the United States Code [Section 402(a)(7)(A) of the AFDC statute]."

The Ninth Circuit's affirmance of the District Court's interpretation is in conflict with decisions of the Third and Fourth Circuits causing a significant disparity in the treatment of AFDC beneficiaries based solely on residence. This Court granted the Government's petition for a writ of certiorari to resolve the conflict.

Subsequently, on July 19, 1984, the President signed into law the Deficit Reduction Act of 1984, Pub. L. 98-369 (1984). Section 2625(a) of that Act, entitled "Clarification of Earned Income Provision," amends § 402(a)(8) of the AFDC statute to provide "that in implementing [Section 402(a)(8)] the term 'earned income' shall mean gross earned income, prior to any deductions for taxes or for any other purposes." This amendment became effective on the date of enactment.

The Government argues in its application for a stay that Congress has resolved, at least from the date of enactment of this amendment forward, the precise issue on which we granted certiorari. In their memorandum in opposition to the Government's application for a stay, which I requested, the AFDC respondents argue that the Deficit Reduction Act, while resolving the meaning of "earned income" in § 402(a)(8), does not resolve the meaning of "income" in § 402(a)(7)(A) and thus does not overrule, prospectively, the interpretation of the Ninth Circuit on the ultimate issue of whether the $75.00 standard work expense disregard is deducted from net income or gross income. In my judgment, respondents' position is wrong. The conference

report to the Deficit Reduction Act refers specifically to the conflict between the Ninth Circuit on the one hand and the Third and Fourth Circuits on the other, including the fact that this Court has agreed to hear the Ninth Circuit case, and states that the Act

> "[a]mends the AFDC statute to make clear that the term 'earned income' means the gross amount of earnings, prior to the taking of payroll or other deductions."

H.R. Conf. Rep. No. 98-861, pp. 1394-1395 (1984). From the report's discussion, it seems clear to me that Congress intended the amendment of § 402(a)(8) to resolve the conflict, at least for the future, on the issue on which we granted certiorari. I do not see how this discussion is either confusing or ambiguous, as claimed by respondents.

The Government has made out a compelling case for a prospective stay. Effective July 18, 1984, petitioners are unambiguously directed by statute to deduct the work expense disregard from gross income, prior to any deductions for taxes or any other purposes; yet they are still subject to an injunction prohibiting them from doing the same. When this Court decides the merits of the Ninth Circuit decision affirming the injunction, which was based on the statute as it stood prior to the Deficit Reduction Act, the Court will probably also decide the validity of the injunction after the effective date of the Act. As is evident from the discussion above, I think there is a high probability that the Court will determine, as urged by the Government in this application, that the injunction is prospectively improper and should be dissolved as to AFDC eligibility and benefit determinations subject to the July 18, 1984, amendment. I express no opinion on the merits prior to the effective date of the Deficit Reduction Act.

I also conclude that without a stay the Government will suffer irreparable injury. If the Government succeeds on the

merits, which I am confident it will as to the future interpretation of the work expense disregard, the continued application of the injunction will result in approximately $2.6 million in improper AFDC payments each month, divided equally between the federal Government and the State of California, a figure which respondents apparently concede. Should the Government ultimately lose on this issue, respondents and others so entitled will be able to collect back AFDC payments that would have been made but for the requested stay. On the other hand, it is extremely unlikely that the Government would be able to recover funds improperly paid out. See *Edelman* v. *Jordan*, 414 U.S. 1301, 1302-1303 (1973) (Rehnquist, Circuit Justice). A stay is, therefore, appropriate.

Finally, the individual respondents cite this Court's Rule 44.4, which provides that an application for a stay to a Justice "shall not be entertained, except in the most extraordinary circumstances," unless the relief requested has first been sought below, and argue that there are no extraordinary circumstances present in this case. They further cite my opinions in *Conforte* v. *Commissioner of Internal Revenue*, U.S. , 103 S. Ct. 663 (1983) (Rehnquist, Circuit Justice), and *Dolman* v. *United States*, 439 U.S. 1395 (1978) (Rehnquist, Circuit Justice), where stays were denied in part for failure to apply for a stay in the lower courts. In *Conforte* there was no reasonable probability that certiorari would have been granted, and the applicant had not shown any legitimate reason, let alone extraordinary circumstances, for not seeking a stay in the Court of Appeals. In *Dolman* the information presented to me in the application for a stay was sketchy as to whether the applicants had requested a stay below, and there was no apparent reason for not requesting such a stay below.

The situation in the instant case is quite different. The reason for requesting a stay arose only after this Court granted certiorari and was not available when the case was before the lower courts. The Government contends that because certiorari had been granted, it was doubtful that either the District Court or the Court of Appeals had the authority to modify the injunction. I agree with the Government that such doubt exists; and whether or not an application to one of the lower courts would have been proper under the circumstances, I believe an application directly to this Court is not improper.

I think there are compelling reasons to grant immediate relief. With respect to the future propriety of the injunction, the Government is almost certain to prevail on the merits, because of the intervening congressional action. Every day the injunction remains in force the clearly expressed intent of Congress is being frustrated, and public funds are being improperly expended without realistic possibility of recovery at the rate of $2.6 million per month. It would be an empty and costly formality to force the Government to refile its application in the lower courts. In my judgment, the "most extraordinary circumstances" requirement of Rule 44.4 is met in the unusual circumstances of this case.

The application for a stay of the District Court injunction is granted prospectively from July 18, 1984.